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No. _____

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In The

# Supreme Court of the United States

October Term 1989

RAYMOND M. GRAY,

*Petitioner,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

I. Did the district court err in allowing Mr. Gray's former attorney to disclose and testify about confidential oral communications between himself and Mr. Gray – including communications concerning sentencing strategy, the merits and consequences of executing a waiver of appearance bond, Mr. Gray's understanding of the effect of the executed waiver form based on counsel's advice, and Mr. Gray's understanding of his obligations to appear personally in court based on counsel's advice?

II. Did the violation of the published Local Rule establishing a mandatory procedure by which the Clerk assigns judges deny Mr. Gray due process of law, or burden his right to trial, especially where violation of the mandatory Local Rule was occasioned by special reassignment of Mr. Gray's case to a particular judge who uniformly imposes harsher sentences than any other judge in the Western District of Washington?

III. Was Mr. Gray's decision not to testify burdened and his right to a fair trial violated by the prosecutor's reference in closing argument to the jury's inability to know what was "inside his [Mr. Gray's] mind", as a supposed means of explaining to the jury that it was not required to prove guilt beyond all doubt?

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## OPINION IN THE APPELLATE COURT

The United States Court of Appeals for the Ninth Circuit filed its opinion on June 5, 1989. The decision is reported at 876 F.2d 1411 (9th Cir. 1989); a copy is attached as Appendix A.

## JURISDICTION OF THIS COURT

This Court has jurisdiction over this case under 28 U.S.C. §1254(1), to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit. The opinion was filed on June 5, 1989. Appendix A. The decision became final on December 28, 1989, when the Court of Appeals denied Mr. Gray's timely-filed Petition for Rehearing and Suggestion for Rehearing En Banc. A copy of the Order denying the Petition for Rehearing and Suggestion for Rehearing En Banc is attached as Appendix B. Petitioner respectfully prays that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND GENERAL ORDER WHICH THIS CASE INVOLVES

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of the Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be

subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

18 U.S.C. §§3146(a) and (b):

(a) Offense. – Whoever, having been released under this chapter knowingly –

(1) fails to appear before a court as required by the conditions of release; or

(2) fails to surrender for service of sentence pursuant to a court order; shall be punished as provided in subsection (b) of this section.

(b) Punishment. – (1) The punishment for an offense under this section is –

(A) if the person was released in connection with a charge of, or while awaiting sentence, surrender for service of sentence, or appeal or certiorari after conviction for –

(i) an offense punishable by death, life imprisonment, or imprisonment for a term of 15

years or more, a fine under this title or imprisonment for not more than ten years, or both;

(ii) an offense punishable by imprisonment for a term of five years or more, a fine under this title or imprisonment for not more than five years, or both;

(iii) any other felony, a fine under this title or imprisonment for not more than one year, or both; and

(B) if the person was released for appearance as a material witness, a fine under this chapter or imprisonment for not more than one year, or both.

(2) A term of imprisonment imposed under this section shall be consecutive to the sentence of imprisonment for any other offense.

Local Rules W.D. Wash. General Rule 8:

(a) All actions, causes, and proceedings, civil and criminal, shall be assigned by the clerk to the respective judges of the court.

(b) Whenever a motion or affidavit to recuse due to alleged bias or prejudice directed at a Judge of this Court is filed pursuant to 28 U.S.C. § 144, the Clerk shall refer determination of the sufficiency of the matter to the Chief Judge.

Whenever the motion or affidavit is directed at the Chief Judge, the Clerk shall refer the matter to the next senior active Judge.

## STATEMENT OF THE CASE

### Procedural Background

Raymond M. Gray was indicted by a grand jury sitting in the Western District of Washington for one count of failure to appear in violation of 18 U.S.C. §3146(a) and (b). The indictment alleged that Mr. Gray was required to appear personally for sentencing on September 25, 1987, for a bank fraud conviction and that he willfully failed to do so. The Honorable John C. Coughenour was originally assigned the failure to appear case by the Clerk of the District Court, in accordance with Local General Rule 8 of the Western District of Washington.

Mr. Gray was arraigned on the failure to appear indictment on January 29, 1988. On February 4, 1988, without any prior notice or explanation to the defendant, Judge Coughenour reassigned the case, by issuance of a Minute Order, to the Honorable Barbara J. Rothstein. *See* Clerk's Docket, Appendix C, Document No. 7. On March 18, 1988, again without prior notice or explanation, Judge Rothstein reassigned the case to the Honorable Jack E. Tanner "for trial." Appendix C, Document No. 14; Minute Entry, also in Appendix C. Counsel received this Order on March 21, 1988.

Mr. Gray, having obtained counsel just before the second reassignment, filed a motion with the court on March 29, 1988. Appendix C, Document 15. The motion sought reassignment to Judge Coughenour or return to the clerk for random reassignment. The Government

opposed and the district court denied the motion. Reporter's Transcript ("RT") at 7 (Appendix D).

Mr. Gray also filed a pretrial motion in limine requesting that the district court preclude the Government from introducing evidence of confidential communications between Mr. Gray and his former attorney about Mr. Gray's obligation to appear in court on the date which was the subject of the indictment. After a pretrial evidentiary hearing at which Mr. Gray's former attorney testified, the district court denied the motion. RT: 50-51.

Mr. Gray proceeded to trial before a jury on April 4, 1988. He was found guilty as charged. Mr. Gray was sentenced on June 24, 1988, to the maximum term of imprisonment and the maximum fine – five years and $250,000. The court also ordered that the prison term be served consecutively to the fifteen year term of imprisonment that Mr. Gray had received for the underlying bank fraud conviction.

**Factual Background**

Raymond M. Gray, the defendant, was charged in a one count indictment with failure to appear (18 U.S.C. §§ 3146(a) and (b)). Clerk's Docket, Document 1 (Appendix C). The indictment alleged that Mr. Gray had failed to appear on September 25, 1987, for his sentencing in *United States v. Ascani et al.*, No. CR 86-202-R, a case in which Mr. Gray had been convicted of eight counts relating to a bank fraud conspiracy.

Mr. Gray had been indicted in the bank fraud case in the summer of 1987. The testimony and evidence at the

trial in the present case established that on August 7, 1986, Mr. Gray had executed an appearance bond in the bank fraud case. RT: 123 (Appendix D). Mr. Gray was released on his own recognizance. The appearance bond stated that Mr. Gray was required to be present for trial on October 14, 1987 and at all other hearings. RT: 123-24.

Mr. Gray was represented in the bank fraud case by Kent Robison, an attorney from Nevada. Mr. Robison (who was called as a government witness in the failure to appear case) testified that the bank fraud trial was not conducted on October 14, 1986, as originally scheduled, and Mr. Gray was ultimately not required to appear on that date. RT: 125.

The bank fraud trial eventually began in March of 1987 and lasted approximately three months. RT: 125-26. At the conclusion of the taking of evidence, both Mr. Robison and Mr. Gray wanted to be excused from being present at the taking of the verdict. RT: 136. Accordingly, Mr. Robison prepared a handwritten waiver of appearance statement for Mr. Gray, which Mr. Gray executed on May 28, 1987. RT: 136-37. The waiver prepared by Mr. Robison and executed by Mr. Gray stated:

> I, Raymond M. Gray, do hereby waive my presence at subsequent proceedings in this matter, specifically the return of the verdict.

RT: 138. Mr. Robison filed the executed waiver statement with the court.

The jury returned its verdict on June 3, 1987, finding Mr. Gray guilty of all eight counts of the indictment in which he was named. RT: 127-28. Neither Mr. Robison nor Mr. Gray were present at that time. TR: 127. Sentencing

was set at that time for July of 1987. RT: 129. The sentencing, however, was subsequently continued to September 18, 1987, and neither Mr. Gray nor Robison appeared at the originally set sentencing date in July. RT: 129, 138.

The September 18th sentencing date was also continued, this time to September 25, 1987, by an order issued by the district court. RT: 141. The order directing the continuance to September 25, 1987, was sent only to the attorneys involved in the case. RT: 141. There was no evidence that Mr. Gray had ever been notified by the court of the sentencing date of September 25, 1987.

However, the Government's only witness on this issue at the failure to appear trial, attorney Robison, testified that he had informed Mr. Gray of the September 25 sentencing date and he further testified that he had informed Mr. Gray that he was obligated to appear. Attorney Robison also testified that it would have been his regular practice to notify Mr. Gray of his obligation to appear by letter, but that he did not specifically recall writing such a letter in this case (and no such letter was produced at trial). Attorney Robison further testified that he last spoke with Mr. Gray on September 24, 1987, at approximately 11:30 p.m., when Mr. Gray called his hotel room in Seattle and informed him that he was at a hotel which was located near the courthouse. Mr. Robison disclosed his discussions with Mr. Gray concerning the language of the waiver, including Mr. Gray's understanding, based on this advice of his obligations under the waiver; Mr. Robison disclosed his discussion with Mr. Gray concerning the appearance bond, including Mr. Gray's understanding, based on this advice, of his obligations under the appearance bond; and Mr. Robison disclosed

their attorney-client communications concerning appearance bond and sentencing strategy. RT: 130-56 (only portions of the transcript necessary for this petition are included in Appendix D).

On September 25, 1987, at approximately 1:00 p.m., Mr. Gray's case was called for sentencing. Mr. Robison testified that he was present but Mr. Gray was not, although Mr. Robison also testified that Mr. Gray's father, sister and brother were present. RT: 132.

After Mr. Gray failed to appear on September 25, a warrant was issued for his arrest. On December 8, 1987, Enrique Perez, a Deputy United States Marshal, received a telephone call from the Mexican Federal Judicial Police that Mr. Gray was being detained at the Tijuana International Airport, in Tijuana, Mexico. Mr. Gray was thereafter returned to Seattle for prosecution on the present failure to appear case.

## JURISDICTIONAL BASIS IN THE COURTS BELOW

The district court had jurisdiction over this case because Mr. Gray was charged with violating a federal criminal statute, 18 U.S.C. §3146. The Judgment of the District Court was entered on June 29, 1988, and Mr. Gray's Notice of Appeal was timely filed on July 5, 1988. The Court of Appeals had jurisdiction over the appeal under 28 U.S.C §1291 to review this final Judgment.

## ARGUMENT

### I. THE NINTH CIRCUIT'S DECISION TO STRIP THE ATTORNEY-CLIENT PRIVILEGE FROM DISCUSSIONS OF SENTENCING STRATEGY, APPEARANCE BOND MEANING AND OBLIGATIONS, AND THE MERITS AND CONSEQUENCES OF A WAIVER OF APPEARANCE, CREATES A CONFLICT IN THE CIRCUITS; ITS FURTHER DECISION THAT THE DEFENDANT'S FORMER ATTORNEY CAN BE CALLED BY THE GOVERNMENT TO PROVIDE THE LAST LINK IN THE CHAIN OF EVIDENCE RAISES IMPORTANT QUESTIONS OF LAW

#### A. The Decision to Strip the Attorney-Client Privilege from Twenty Pages Worth of Former Counsel's Testimony About Mr. Gray's Hopes and Desires, Strategies and Tactics, and the Merits and Consequences of Particular Decisions, Creates a Conflict in the Circuits

In general, an attorney's communication to his client about the single fact of a court appearance is not privileged. This is true throughout the Circuit Courts of Appeals. *See, e.g., United States v. Clemons*, 676 F.2d 124, 125 (5th Cir. Unit B 1982) (the only fact to which prior counsel testified, "that he had informed Clemons that his trial was scheduled for the weeks of August 6 and 13, 1979," was not privileged); *In re Grand Jury Proceedings, Des Moines, Iowa*, 568 F.2d 555, 557 (8th Cir.), *cert. denied* 435 U.S. 999 (1977) (communications "regarding the time and place of trial" are not confidential); *United States v. Uptain*, 552 F.2d 1108, 1109 (5th Cir.), *cert. denied* 434 U.S. 866 (1977) ("Counsel's message to his client concerning the date of trial" not privileged); *United States v. Freeman*, 519 F.2d 67, 68 (9th Cir. 1975); *United States v. Bourassa*, 411

F.2d 69, 74 (10th Cir.), *cert. denied* 396 U.S. 915 (1969); *United States v. Hall*, 346 F.2d 875, 882 (2d Cir.), *cert. denied* 382 U.S. 910 (1965).

Communications between the attorney and client of anything concerning the court appearance other than the single message from the court about the date of the court appearance is, however, privileged. This is also true throughout the Circuit Courts of Appeals. One appellate court has addressed this question directly, and explicitly held that the attorney-client privilege protects every communication except delivery of the message of the date of the court appearance. *In Re Grand Jury Subpoena (Bierman)*, 788 F.2d 1511, 1512 (11th Cir. 1986) (hereafter *"Bierman II"*), *modifying* 765 F.2d 1014 (11th Cir. 1985) (hereafter *"Bierman I"*). Other appellate courts have made this ruling implicitly. *United States v. Clemons*, 676 F.2d 124, 125; *United States v. Hall*, 346 F.2d 875, 882 (no privilege applied to communication of court date because "Defendant's counsel served merely as a conduit for transmission of a message."). *See also State v. Ogle*, 682 P.2d 267, 268 (Or. 1984) (communication of the date of arraignment from attorney to client is not privileged, partly because it involves a single fact which is a matter of public record; affirming trial court's decision to admit former counsel's testimony about the single fact of notification, but not the letter to the client which included legal advice).

In *Gray*, the district court allowed counsel to testify about not just the court ordered appearance date but also about confidential communications concerning advice, appearance obligations, strategies, and Mr. Gray's understanding of his obligations. The Ninth Circuit affirmed.

The *Bierman II* court explained its holding, which directly contradicts the holding of the Ninth Circuit in Mr. Gray's case:

> In *United States v. Clemons*, 676 F.2d 124, 125 (5th Cir. Unit B 1982), the court held that "[a]n attorney's message to his client concerning the date of trial is not a privileged communication." The government argues that under *Clemons*, Bierman must disclose whether he communicated the surrender date to the client. *Clemons* does not, however, apply to this case.
>
> *United States v. Freeman*, 519 F.2d 67, 68 (9th Cir. 1975) is not to the contrary. The evidence sought to be elicited from the defendant's attorney in Freeman was not protected under the attorney-client privilege because "[i]t simply related to whether [the attorney] had advised his client of the court's order to appear." The challenged question here asks more than whether Bierman gave the client notice of the surrender date. The question asked: What did you say to or tell your client about the notice to surrender? It takes only a little imagination to recognize the numerous possible answers that would involve legal advice of the most sensitive nature. Communications between an attorney and his client made for the purpose of securing legal advice are protected under the attorney-client privilege. *In Re Grand Jury Proceedings (Twist)*, 689 F.2d 1351, 1352 (11th Cir. 1982).
>
> If the government wanted to know only whether Bierman had advised his client of the surrender date, it should have asked him that directly and precisely.

788 F.2d at 1512 (footnotes omitted; brackets in original) (affirming district court order quashing grand jury subpoena).[1]

The district court in this case allowed the Government to question Mr. Gray's former lawyer, Mr. Robison, about much more than communication of the sentencing date. Mr. Robison also testified, over objection,[2] about the following confidential communications with his client: that Mr. Gray would be required to appear for sentencing (RT: 130); that he informed Mr. Gray of this requirement several times (RT: 131); that he advised Mr. Gray of the maximum penalty for the offenses, "Up to 45 years imprisonment and thousands of dollars in fines" (RT: 131);

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[1] The footnote in *Bierman II* quoted the two permissible questions that the Government asked in *Freeman*:

> [Did you a]dvise the Court that you wrote [your client] a letter . . . advising her that her case would be on calendar today . . . ?
>
> * * *
>
> Did you further state to the Court . . . that you had discussed the court appearance . . . with your client via telephone advising her that she had an appearance?

788 F.2d 1511, 1512 n.4 (quoting *Freeman*, 519 F.2d at 69 n.9).

[2] The objection was initially preserved by defendant's pretrial motion. Clerk's Docket, Document 27 (Appendix C). Mr. Gray's counsel reiterated the objection throughout the Government's direct examination of Mr. Robison. RT: 119-134; 147-157; 159-163 (only portions of this transcript required for this petition are included in Appendix D).

that he offered Mr. Gray this advice "[t]hroughout the proceedings" (RT: 132); that he advised Mr. Gray about the effect of the "conditions of the Appearance Bond" (RT: 148); that he discussed the language contained in the waiver of Mr. Gray's right to be present at court proceedings with Mr. Gray, and explained the import and consequences of that language, including specific examples (RT: 149); that he gave Mr. Gray advice "specifically" about the circumstances to which the waiver applied (RT: 149); about discussions, back and forth, with Mr. Gray, planning this waiver of presence (RT: 149-50); and about conversations with Mr. Gray about the agenda they had set for the date of sentencing, including the meeting set with other counsel for the morning (RT: 155-56).

In fact, Mr. Robison was even permitted to disclose confidential discussions concerning strategy for sentencing, and Mr. Gray's private thoughts on the matter:

> That was part of the discussion that – and it was very important to Mr. Gray to be present at every single stage, at arraignments, at motions. He was adamant about that, that he wanted to show Judge Rothstein that he was a good candidate for his Appearance Bond. And it was very important for him to be present, actually physically present so Judge Rothstein would visualize his presence. And that's why we carefully drafted this document as we did.

RT: 152 (attorney Robison's testimony).

> There is no question that we discussed it the day before I left for Seattle in my parking lot. We discussed in detail not only his presence but the

> entire strategy involved and his participation in the sentencing on the next day at 1 o'clock.

RT: 154-55 (attorney Robison's testimony).

The Ninth Circuit in *Gray* thus stripped the attorney-client privilege from communications concerning sentencing strategy, sentencing advice, appearance bond advice, advice concerning the drafting, meaning and consequences of the waiver, and strategy for maintaining the appearance bond. The Ninth Circuit in *Gray* upheld the disclosure of all the information that the Eleventh Circuit, in *Bierman II*, explicitly held to be privileged, and that the other Circuit Courts of Appeal have implicitly found to be privileged. *See, e.g., United States v. Uptain*, 552 F.2d 1108, 1109; *United States v. Hall*, 346 F.2d 875, 882. Review on this writ of certiorari should be granted for this reason alone. S.Ct. Rule 17.1(a).

Further, the Ninth Circuit did this in a case where the attorney testimony on those private matters was crucial to the Government's case. Prior to the jury deliberating in the underlying bank fraud case, Mr. Gray executed a waiver of appearance form. Mr. Gray gave up, with court approval, his right to be present at further court proceedings. Former counsel's extra[3] testimony – the testimony about the advice concerning the meaning, merits, and consequences of the waiver form, the appearance bond, the sentencing strategy – was therefore essential to the

---

[3] That is, testimony over and above the simple fact of delivering the court's message about the sentencing date.

Government's case. Thus, the district court's decision to admit confidential communications was dispositive.[4]

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[4] The fact that Mr. Gray's former lawyer also testified about delivering to Mr. Gray the Court's notice of the date of sentencing does not diminish the importance of this issue. This is the only way the issue can arise – the attorney who delivers the message about the date of appearance to the client is the only attorney who knows the other privileged communications.

The issue could well be dispositive even if the continuance and waivers were not an issue. For example, in United States v. Ray, 768 F.2d 991 (8th Cir. 1985), the court of appeals found that admission of a transcript of the former lawyer's comments at arraignment about giving notice of the court date violated Fed. Rules Evid. Rule 803(5) (record refreshing recollection is inadmissible). The appellate court held that the error was not harmless because the Government used this transcript in closing argument and it applied to an essential, disputed element of the crime.

In Mr. Gray's case, the argument concerning the importance of Mr. Robison's full testimony comprised the bulk of the Government's closing. It involved a disputed element. Believability of Mr. Robison's testimony was the most important part of the Government's case. It was testimony in which the Assistant United States Attorney expressed his own, personal confidence. *Cf.* United States v. Prantil, 764 F.2d 548, 555-56 (9th Cir. 1985); United States v. West, 680 F.2d 652, 655-56 (9th Cir. 1982).

> . . . Raymond Gray was both aware that he was required to appear at 1 o'clock on September 25th and that he willfully did not appear.
>
> *I say that with such confidence,* ladies and gentlemen, because Kent Robison, an attorney with years

(Continued on following page)

This conflict involves the scope of the attorney-client privilege, which is an important question of law that should be settled by this Court. *Developments in the Law – Privileged Communications*, 98 Harv. L. Rev. 1450, 1514-24 (1985) (identifying the "effective advocate" and the "incrimination concern" rationales as the sometimes conflicting theoretical foundations upon which the privilege rests, the utilitarian calculus applied under both rationales, criticizing the ineffectiveness of both theories and the courts' practice, and proposing, instead, a single "intent-based crime-fraud exception" to cover situations such as the one presented by this case). *Cf. Fisher v. United States*, 425 U.S. 391, 403 (1975). Review on this writ of certiorari should be granted for this reason, also. S.Ct. Rule 17.1(c).

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> of experience going into 16 going on 17 years of experience as a litigator as a trial lawyer, representing many, many, many defendants over the years, has told you a number of things.
>
> * * *
>
> *He's also, I think very honestly, told you,* that he can't honestly remember signing the letter, and I think that's if anything, an indication of how truthful he is . . .
>
> * * *
>
> *He [Mr. Robison] well knows the penalty for perjury* when he's sitting on the witness stand, and he is not, ladies and gentlemen, going to get on the witness stand and risk his license and liberty, if you will, his license to practice law and his liberty by perjuring himself.

RT: 191, 219 (Government's closing argument) (emphasis added).

### B. The Decision that no Exception to Disclosure Applies Where, as Here, that Disclosure Provides the Last Link of Incriminating Evidence Presents Another Important Question

The Ninth Circuit, in *Gray*, also holds that no exception to the general rule requiring disclosure of a communication of nonprivileged information applies. But other courts recognize an exception to disclosure where the communication between the attorney and the client "would supply the last link in an existing chain of incriminating evidence . . . ." *In Re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026, 1027 (5th Cir. 1982) *rev'g* 663 F.2d 1057 (5th Cir. 1981). *Accord In re Grand Jury Proceedings (Jones)*, 517 F.2d 666 (5th Cir. 1975); *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960).

The facts of Mr. Gray's case fit this exception like a glove. To convict Mr. Gray of failure to appear in violation of 18 U.S.C. § 3146, the Government had to prove that he had knowledge of his required appearance and failed to appear willfully. *United States v. McGill*, 604 F.2d 1252, 1254 (9th Cir.), *cert. denied* 444 U.S. 1035 (1980). The only evidence the Government offered on either element was the testimony of Mr. Gray's former attorney.

Mr. Gray's case thus raises the question whether communication of the date of sentencing is somehow exempt from the "last link" doctrine. *See, e.g. Re Grand Jury Subpoena (DeGuerin)*, ___ F. Supp. ___ (S.D. Tex., No. Misc. H-89-522, Oct. 31, 1989, Slip op. 9-14) (recognizing the "last link" exception, finding unnecessary interference with the Sixth Amendment right to counsel, and exercising its supervisory powers to prevent a chilling

effect on that right, court quashes subpoena for fee information about an already indicted client).[5]

## II. WHETHER VIOLATION OF A PUBLISHED, OFFICIAL LOCAL RULE OF COURT WHICH ESTABLISHES A MANDATORY PROCEDURE FOR THE ASSIGNMENT OF JUDGES TO CASES, AND THEREBY RESULTS IN THE NON-RANDOM, SPECIAL REASSIGNMENT OF A CRIMINAL CASE TO A PARTICULAR JUDGE VIOLATES THE RIGHT TO DUE PROCESS OR BURDENS THE RIGHT TO TRIAL AND WHETHER IT IS AN IMPORTANT QUESTION OF FEDERAL LAW

### A. The Reassignments in Violation of the Local Rule

In the United States District Court for the Western District of Washington, the assignment of cases is governed by Local General Rule 8:

> (a) All actions, causes, and proceedings, civil and criminal, shall be assigned by the Clerk to the respective judges of the Court.

This Local Rule, and the expectation it elicits of a right to random assignment of judges in criminal cases, were violated in Mr. Gray's case: on two occasions his case was transferred in violation of the Rule. The second reassignment was to the Honorable Jack E. Tanner "for trial."

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[5] Counsel recognizes that the only other controlling appellate court decision on this issue holds that the "last link" doctrine does not apply to communication of the date of the court appearance. United States v. Innella, 821 F.2d 1566, 1567 (11th Cir. 1987).

Mr. Gray timely moved to have his case reassigned back to the originally assigned judge, or reassigned by the clerk, in order to protect this right. Clerk's Docket, Document 15 (Appendix C). The district court denied the motion (RT: 50-51) and the Ninth Circuit affirmed. The right to random assignment of criminal cases, in accordance with local rules, in a manner that is fair and appears fair, raises an important question of federal law which should be decided by this Court.[6]

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[6] Counsel timely objected to the reassignment. At the time of the first reassignment, from Judge Coughenour to Chief Judge Rothstein, Mr. Gray was unrepresented and there is no record that Mr. Gray, who was detained, received notice of the reassignment. Thereafter, when trial counsel was admitted pro hac vice and the case was reassigned again, counsel immediately objected to both reassignments, by notice and motion, prior to trial, in conformity with the trial court's motions practice, in time to cure the defect, with a specific request for reassignment that would cure the defect, and before either Judge had taken any action on the case other than to reassign. The relevant dates, based on the Clerk's Docket (Appendix C) and Defendant's Motion for Leave to File Pretrial Motion to Reassign Case (Document 14 of Clerk's Docket, Appendix C), show:

| | |
|---|---|
| January 20, 1988 | Indictment |
| No further action taken by J. Coughenour on this case | |
| February 4, 1988 | Reassignment to C.J. Rothstein |
| February 19, 1988 | Counsel's application to appear pro hac vice filed |
| February 24, 1988 | Application granted |

(Continued on following page)

### B. The Conflict in the Circuits

The Ninth Circuit's apparent approval of the district court's decision to violate its own mandatory rule creates a conflict in the circuits. Compare *Gray with United States v. Feretti*, 635 F.2d 1089, 1093 (3rd Cir. 1980) ("once a court announces a policy or rule of procedure, until such rule is effectively repealed, the court cannot ignore its own rule or procedure, else litigants who have relied upon it may

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No further action taken by C.J. Rothstein on this case

| | |
|---|---|
| March 18, 1988 | Reassignment to J. Tanner |
| March 21, 1988 | Receipt of reassignment order |
| March 28, 1988 | Counsel informs Government that motion requesting reassignment will be filed |
| March 29, 1988 | Motion challenging reassignment filed |

Notwithstanding these facts, the Ninth Circuit found that Mr. Gray waived his objection to reassignment and violation of the Local Rule. This finding of waiver, in itself, creates a conflict in the circuits. No other case of which defense counsel is aware has applied a waiver analysis in this context. Even the cases from other circuits that decide the substantive issue adversely to defendants address the merits. They do not find a waiver, even where the objection to the assignment procedure is not raised until after the trial. *E.g.* Sinito v. United States, 750 F.2d 512 (6th Cir. 1984).

Because the Ninth Circuit's finding of waiver on these facts conflicts with the decision of the Sixth Circuit in *Sinito*, review on this writ of certiorari is appropriate for this reason, also. S.Ct. Rule 17.1(a).

be led astray") (court rule at issue involved closing arguments). *See also United States v. Diaz-Villafane*, 874 F.2d 43, 46 (1st Cir. 1989) ("Once local rules have been promulgated, lawyers and their clients have a right to place reasonable reliance on them.") (local rule concerned notification of witnesses at sentencing); *Amader v. Pittsburgh Corning Corp.*, 546 F. Supp. 1033, 1038 (E.D. Pa. 1982) (denial of motion to reconsider based in part upon counsel's failure to comply with court rule: "The Third Circuit has held that the local rules of this district court must be given effect and they cannot be ignored by the district courts.") Review is therefore appropriate. S.Ct. Rule 17.1(a).

### C. The Issue is Important Because Special Reassignment of This Criminal Case "For Trial" Burdens the Right to Trial, Violates Due Process, and May Interfere with Plea Negotiations

This is more than mere formalism. In the Western District of Washington, transfer of criminal cases to Judge Tanner, after initial assignment to another judge, and after the defendant asserts the right to jury trial, is a true threat. It is a threat because of Judge Tanner's sentencing practices. It is a matter of public record that Judge Tanner's harsh sentencing practices and pro-Government attitude[7] and rulings are viewed as a threat throughout the

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[7] As Justice Douglas wrote, "a particular judge's emphasis may make a world of difference when it comes to rulings on evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like." Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 137 (1970) (Douglas, J., dissenting).

Western District of Washington. See affidavits of defense counsel on file with the court in *United States v. Syrotchen*, D.C. No. 88-95, asserting that in several separate cases handled by Assistant Federal Public Defenders, trials were reassigned to Judge Tanner after defendant's assertion of the right to jury trial and sometimes as a direct consequence of the assertion of that right, Appendix E.

The consequent burden on a defendant's rights takes several forms. Federal judges are prohibited from participating in plea negotiations. Fed.R.Crim.P. 11(e)(1); *United States v. Werker*, 535 F.2d 198, 201 (2d Cir.), *cert. denied* 429 U.S. 926 (1976); *United States v. Adams*, 634 F.2d 830, 835 (5th Cir. Unit A 1981). In addition, it is considered unethical for judges to influence plea discussions. *See* Fed.R.Crim.P. 11, Advisory Committee Note. By transferring cases apparently in response to defendants' decisions to proceed to trial (see Affidavits, Appendix E), reassignment to Judge Tanner impermissibly interferes with this process.

It is a violation of due process for a judge – whether the transferor or the transferee – to take vindictive action in response to the assertion of the right to jury trial. *See North Carolina v. Pearce*, 395 U.S. 711 (1969). The "courts must not use the sentencing powers as a carrot and stick to clear congested calendars, and they must not create an appearance of such a practice." *United States v. Medina-Cervantes*, 690 F.2d 715, 716 (9th Cir. 1982) (quoting *United States v. Stockwell*, 472 F.2d 1186, 1187 (9th Cir.), *cert. denied* 411 U.S. 948 (1973)). Reassigning cases to Judge Tanner, apparently in response to certain defendants' decisions to proceed to trial (see Affidavits, Appendix E), therefore amounts to a violation of due process. *Cf. Connally v. Georgia*, 429 U.S. 245 (1977) (a fundamental aspect

of due process is the right to a neutral judge who does not have an interest in the case).

### D. The Issue is Important Because the Mandatory Local Rule Creates an Expectation That is Protected by the Due Process Clause

Further, the Local Rule itself, by protecting these important rights, creates a due process protected liberty interest. *See, e.g., Board of Pardons v. Allen*, ___ U.S. ___, 107 S.Ct. 2415 (1987); *Greenholtz v. Nebraska*, 442 U.S. 1 (1979); *Leis v. Flynt*, 439 U.S. 438 (1979); *Perry v. Sinderman*, 408 U.S. 593, 602, n.7 (1972). *Cf. United States v. Diaz-Villafane*, 874 F.2d 43, 46 (local rules raise justifiable expectation of compliance in lawyers and their clients). Where a particular government rule or regulation provides that an individual shall be treated in a particular manner, the individual gains a due process right to be treated in accordance with that rule or regulation. For example, in *Greenholtz*, this Court ruled that prospective parolees in the Nebraska prison system had a due process right to have their parole release decisions determined in accordance with the rules and regulations of the Nebraska Parole Board – because of the mandatory terms of the rules governing parole release in Nebraska. In *Leis v. Flynt*, this Court considered whether an out of state attorney had a due process protected interest in being able to appear as counsel in a criminal proceeding in Ohio. This Court ultimately ruled that the attorney did not have a due process protected interest in being able to appear as counsel, since there were no laws or rules which provided that an attorney had that right. 439 U.S. at 442-43. Significantly, however, this Court indicated that if there

were such a rule or law, an attorney would then have a due process protected interest in being able to appear in accordance with the rule or law. 439 U.S. at 442.

This is just as true under the due process clause of the Fifth Amendment, and the federally-created liberty and property rights it protects, as it is under the due process clause of the Fourteenth Amendment, and the state-created rights that it protects. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).[8]

### E. The Issue of Hand-Picking Judges to Try Criminal Cases Raises Critical Questions of Fairness and the Appearance of Fairness

The issue of hand-picking judges to try criminal cases is also one of exceptional importance. *See* S.Ct. Rule 17.1(c). It implicates the systemic concerns for fairness and the appearance of fairness. *Cruz v. Abbate*, 812 F.2d 571 (9th Cir. 1987) (reversing dismissal of petition for writ of mandamus which challenged assignment of judges in criminal cases: "Respondent's method is simple: he assigns each case to the judge of his choice."); *United States v. Flynt*, 756 F.2d 1352, 1355 n.2 (9th Cir. 1985) ("The General Order [on random assignments of judges] evinces a policy of objectivity and fairness in the distribution of all matters.") It touches our deepest concerns for

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[8] This Court has ruled that the liberties protected by the due process clause of the Fifth Amendment must be construed broadly. Bolling v. Sharpe, 347 U.S. 497, 499-500. It takes no broad construction to recognize that reassignment to a judge with harsh sentencing practices will impact a defendant's liberty.

fairness, integrity and the appearance of fairness in the judicial process. It touches a raw nerve. *See United States v. Claiborne*, 781 F.2d 1327 (9th Cir. 1985) (Reinhardt, J., dissenting to denial of en banc rehearing).

Mr. Gray's case – and perhaps the cases of many other criminal defendants in the Western District of Washington – has been tried by a hand-picked judge. The issue of compliance with this local rule thus raises important questions under the Fifth and Sixth Amendments. Review is therefore appropriate. S.Ct. Rule 17.1(c).

## CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that a writ of certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Ninth Circuit in this case.

DATED: February 26, 1990

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## APPENDIX A

**UNITED STATES of America,**
**Plaintiff-Appellee,**

**v.**

**Raymond M. GRAY,**
**Defendant-Appellant.**

**No. 88-3159**

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 4, 1989.

Decided June 5, 1989.

William J. Genego, University of Southern California Law Center, Los Angeles, Cal., for defendant-appellant.

Thomas C. Wales and Robert H. Westinghouse, Asst. U.S. Attys., Seattle, Wash., for plaintiff-appellee.

Appeal from the United States District Court for the Western District of Washington.

Before ALARCON and THOMPSON, Circuit Judges, and TASHIMA,* District Judge.

ALARCON, Circuit Judge:

Raymond M. Gray (Gray) appeals from the judgment entered following his conviction for failure to appear for sentencing. 18 U.S.C. §§ 3146(a) and (b)(1988 Supp.). Gray seeks reversal on the following grounds:

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* Honorable A. Wallace Tashima, United States District Judge for the Central District of California, sitting by designation.

(1) The reassignment of his case violated local rules governing assignment of cases and denied him due process;

(2) The district court should not have allowed his former attorney to testify that he informed Gray of the date of his sentencing hearing;

(3) Rebuttal arguments made by the Assistant United States Attorney were improper because they were not based upon facts adduced at trial, exceeded the allowable scope of rebuttal, and improperly called attention to the fact that Gray did not testify.

Alternatively, Gray seeks resentencing on the following grounds:

(1) He should have been sentenced under the Sentencing Guidelines;

(2) His sentence was improper because it was based on erroneous information.

We affirm the conviction, but remand for resentencing under the Sentencing Guidelines.

## I

## BACKGROUND

In July 1986, Gray was indicted for conspiracy to commit a series of bank fraud offenses connected to his activities as Chairman of the Board of Directors of Home Savings and Loan Association, Seattle, Washington. On August 7, 1986, Gray executed an appearance bond and was released on his own recognizance. The appearance bond stipulated that Gray was required to be present for

trial and at all other hearings. The trial began in the first week of March, 1987, and lasted approximately three months. At the conclusion of the taking of evidence, Gray signed a handwritten waiver of appearance statement prepared by his attorney, Kent Robinson (Robinson) [sic], and executed on May 28, 1987. The waiver stated: "I, Raymond M. Gray, do hereby waive my presence at subsequent proceedings in this matter, specifically the return of the verdict."

On June 3, 1987, Gray was convicted on all counts of the indictment in which he was named. Sentencing was eventually set for September 25, 1987. Gray failed to appear, and a one-count indictment was returned, charging Gray with failure to appear in violation of 18 U.S.C. §§ 3146(a) and (b). A warrant was issued for his arrest.

On December 8, 1987, Enrique Perez (Perez), a Deputy United States Marshal, was informed by the Mexican Federal Judicial Police that Gray was being detained at the Tijuana International Airport, in Tijuana, Mexico. Perez met the Mexican authorities at the point of entry at San Ysidro, California, where he took custody of Gray. Gray was arrested on December 8, 1987 and escorted to Seattle for prosecution.

The case against Gray for failure to appear was initially assigned to United States District Judge John C. Coughenour. On February 4, 1988, the case was reassigned by Judge Coughenour, without apparent notice or explanation, to Chief Judge Barbara J. Rothstein. On March 18, 1988, the case was again reassigned, without notice or explanation, to Judge Jack E. Tanner.

Gray filed a motion on March 29, 1988, requesting that his case be reassigned back to Judge Coughenour, or alternatively, that his case be returned to the clerk for reassignment in accordance with local rules. After a brief hearing, the district court denied the motion.

Gray proceeded to trial on April 4, 1988. Robinson and Perez were the only witnesses. Gray did not testify. Robinson testified that, during the week preceding September 25, 1987, he informed Gray of the September 25th sentencing date and reminded Gray that his appearance was required. Robinson also testified that on September 24th he informed Gray of his obligation to appear in court the next day.

Gray was convicted for failure to appear. On June 24, 1988, Gray was sentenced to the maximum term of imprisonment (5 years) and the maximum fine ($250,000). The court ordered Gray to serve his 5 – year sentence consecutive to his 15-year sentence for bank fraud. Gray appeals.

## II

## DISCUSSION

### A. *Reassignments of the Case*

Gray alleges that he was denied due process because his case was reassigned in violation of a Local Rule, W.D. Wash. General Rule Eight. General Rule Eight provides that: "All actions, causes, and proceedings, civil and criminal, shall be assigned by the clerk to the respective judges of the court." (Local Rules W.D. Wash. General Rule Eight). Gray concedes that the initial assignment of

his case to Judge Coughenour conformed to General Rule Eight, but he contends that each subsequent reassignment of his case violated General Rule Eight. We do not review independently a district court's determination of the scope and application of local rules and general orders because we give district courts broad discretion in interpreting, applying, and determining the requirements of their own local rules and general orders. *United States v. DeLuca*, 692 F.2d 1277, 1281 (9th Cir.1982); *United States v. Torbert*, 496 F.2d 154, 157 (9th Cir.), *cert. denied*, 419 U.S. 857, 95 S.Ct. 105, 42 L.Ed.2d 91 (1974); *cf. United States v. Freitas*, 800 F.2d 1451, 1454 (9th Cir.1986) (interpretation of the Federal Rules is reviewed de novo).

General Rule Eight does not expressly address reassignments of cases. The government contends that reassignments "are simply not covered by the rule." Gray responds by suggesting that "the Rule, by its own language, covers all assignment of cases. The Rule is not limited, as the government would hope, to initial assignment of cases." A practical interpretation suggests that reassignments should be included in its scope. The government argues, however, that the reassignments were authorized by a General Order of district court regarding division of court business.

Gray contends that the first reassignment from Judge Coughenour to Chief Judge Rothstein on February 4, 1988, was improper because only the Chief Judge is granted authority to transfer cases to other judges pursuant to paragraph 14 of the district court's General Order. Paragraph 14 of the General Order provides:

> 14. The assignment of all civil and criminal cases as above noted is made subject to such change or changes as may be established by the Chief Judge for purposes of equalization of case assignments to all active Judges of the district.

General Order (In the matter of Division of Court Business) (W.D. Wash. March 10, 1988). Gray, however, never objected to the transfer of the case to Chief Judge Rothstein until after the case was reassigned a second time on March 18, 1988, to Judge Tanner. Chief Judge Rothstein had the case for over a month without objection from Gray. Under these circumstances Gray has waived his challenge to the first reassignment of his case to Chief Judge Rothstein. *Cf. United States v. Berberian*, 851 F.2d 236, 240-41 (9th Cir.1988) (defendant who objected to reassignment of his case to a particular judge, but failed to ask that the case be randomly assigned in conformity with a General Order did not preserve the issue for appeal), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1567, 103 L.Ed.2d 934 (1989).

Gray also contends that the second reassignment of his case from Chief Judge Rothstein to Judge Tanner was improper because Chief Judge Rothstein did not indicate that she was exercising her authority under paragraph 14 of the General Order, nor did she indicate that she was doing so "for purposes of equalization of case assignments to all active Judges of the district." General Order (In the Matter of Division of Court Business) (W.D. Wash. March 10, 1988).

Gray cites no authority for the proposition that paragraph 14 of the General Order only authorizes system-

wide changes in the assignment process. The plain language of Paragraph 14 contradicts this interpretation. It succinctly and expressly authorizes "such change or changes" which the Chief Judge establishes. General Order (In the Matter of Division of Court Business) (W.D.Wash. March 10, 1988). The scope of paragraph 14 of the General Order is simply not limited by the restrictive language which Gray has interposed.

Moreover, contrary to Gray's contention, the language of paragraph 14 does not require the Chief Judge to indicate an intent to act pursuant to the General Order. The reassignment was not improper simply because Chief Judge Rothstein did not explicitly indicate that she was acting pursuant to the authority and intent of the General Order.

Judges may reassign cases for almost any reason, provided that the assignment is not for an impermissible reason. *Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir.1987). Gray does not allege that the reassignment to Judge Tanner was for an impermissible reason. Indeed, Gray informed Judge Tanner that he was "not alleging any particular basis for disqualification" of Judge Tanner, but simply [alleging] a violation of the rule. Under these circumstances we find the reassignment to Judge Tanner permissible and within the scope of paragraph 14 of the General Order. Finding no violation of the local rules or general orders, we do not reach Gray's due-process claim.

B. *Attorney-Client Privilege*

Gray alleges that the district court impermissibly allowed his attorney, Robinson, to testify that he

informed Gray of his sentencing date. He contends that the information was a confidential communication protected by the attorney-client privilege. The district court's conclusion that communication of a defendant's obligation to appear is not protected by the attorney-client privilege is a mixed question of law and fact which this court reviews independently and without deference to the district court. *Tornay v. United States*, 840 F.2d 1424, 1426 (9th Cir.1988); *In re Grand Jury Subpoenas (Hirsch)*, 803 F.2d 493, 496 (9th Cir.1986), *modified*, 817 F.2d 64 (1987). "The party asserting an evidentiary privilege has the burden to demonstrate that the privilege applies to the information in question." *Tornay*, 840 F.2d at 1426. Moreover, "[w]e apply the attorney-client privilege only when necessary to effectuate its limited purpose of encouraging complete disclosure by the client." *Id.* at 1428. The privilege is thus narrowly and strictly construed. *Weil v. Investment/Indicators, Research & Management, Inc.*, 647 F.2d 18, 24 (9th Cir.1981).

The attorney-client privilege protects confidential information disclosed by a client to an attorney in order to obtain legal assistance. *Fisher v. United States*, 425 U.S. 391, 403 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976); *In re Grand Jury Subpoenas (Hirsch)*, 803 F.2d at 496. We have held that information concerning a defendant's obligation to appear for sentencing is not "of a confidential nature" and therefore, is not protected by the attorney-client privilege. *United States v. Freeman*, 519 F.2d 67, 68 (9th Cir.1975). An attorney's testimony regarding the fact that the client was informed of the hearing date "simply relate[s] to whether [the attorney] advised his client of the court's order to appear." *Id.*

Nonetheless, Gray contends that his "case must be examined on its facts to determine whether any exceptions to the general privilege rules apply and warrant that such information be protected by the privilege." Gray relies upon the "last link doctrine." *In re Grand Jury Subpoena (Bierman)*, 765 F.2d 1014, 1018-19 (11th Cir.1985), *vacated in part on reh'g*, 788 F.2d 1511 (1986). Gray alleges that his attorney provided the only evidence of his knowledge that he was required to appear and therefore, the attorney' testimony was privileged under the "last link" doctrine.

The last link doctrine has been defined as "a limited and narrow exception to the general rule, one that obtains when disclosure of the [allegedly privileged information] would supply the last link in an existing chain of incriminating evidence likely to lead to the client's indictment." *In re Grand Jury Proceedings (Pavlick)* 680 F.2d 1026, 1027 (5th Cir.1982). We enunciated a similar exception in *Baird v. Koerner*, 279 F.2d 623 (9th Cir.1960). *See also United States v. Hodge & Zweig*, 548 F.2d 1347, 1353 (9th Cir.1977). The narrow exception of *Baird* and its progeny, however, only applies in exceptional circumstances in which disclosure "would reveal information that is tantamount to a confidential professional communication." *Tornay*, 840 F.2d at 1428.

Indeed, the Eleventh Circuit has held that the last-link doctrine does not protect information concerning an obligation to appear. *United States v. Innella*, 821 F.2d 1566, 1567 (11th Cir.1987). The defendant in *Innella* argued that because his attorney's testimony was the only evidence that the government could produce that the "knowingly and willfully" failed to turn himself in as required by 18

U.S.C. § 3150, this evidence was privileged and inadmissible under the "last link" doctrine. The Eleventh Circuit rejected this argument and declined "to extend the last-link exception to this type of situation" stating that the attorney was acting as an officer of the court when he notified his client of the proper date the client was supposed to turn himself in. *Id.*

We also decline to extend the limited exception enunciated in *Baird* to this situation. The district court properly allowed Robinson to testify.

C. *Closing Argument*

Gray objects to certain statements made by the prosecutor during closing argument. Gray alleges that the statements were not supported by evidence, made reference to his decision not to testify, and were beyond the scope of rebuttal argument. At the close of the rebuttal summation, Gray made a motion for a mistrial. After a hearing, the district court denied the motion.

1. *Griffin Error*

Gray contends that the prosecution impermissibly commented upon Gray's decision not to testify. We review independently and non-deferentially a claim that impermissible rebuttal comments violate the fifth amendment. *United States v. Schuler*, 813 F.2d 978, 980 (9th Cir.1987).

The fifth amendment prohibits the prosecution from commenting upon a defendant's decision not to testify. *Griffin v. California*, 380 U.S. 609 , 615 85 S.Ct. 1229, 1233,

14 L.Ed.2d 106 (1965). A prosecutorial statement "is impermissible if it is manifestly intended to call attention to the defendant's failure to testify, or is of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." *Lincoln v. Sunn*, 807 F.2d 805, 809 (9th Cir.1987). Reversal is compelled only "where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis for the conviction and where there is evidence that could have supported acquittal." *Id.* at 809 (quoting *Anderson v. Nelson*, 390 U.S. 523, 88 S.Ct. 1183, 20 L.Ed.2d 81 (1968) (per curiam)). Reversal is warranted if it appears that a prosecutor's comment regarding a defendant's failure to testify may possibly have affected the verdict. *United States v. Pruitt*, 719 F.2d 975, 978 (9th Cir.) (per curiam), *cert. denied*, 464 U.S. 1012, 104 S.Ct. 536, 78 L.Ed.2d 716 (1983).

In closing argument the prosecution stated in pertinent part the following:

> We have the burden of proving beyond a reasonable doubt each of the elements contained in the indictment which has been laid out for you in Judge Tanner's instructions, and that is a burden we welcome. It's a tough burden. That's why I get the chance to talk to you twice. But let me tell you something. Let me tell you what it is not. It is not a burden to prove Raymond Gray guilty of this offense beyond all doubt, beyond all doubt. Judge Tanner has told you, on the other hand, the government is not required to prove guilt beyond all possible doubt.
>
> Now there is a good reason for that, and that is that unless you were Gray, unless you were inside his mind on the night of the 24th, the day

> of the 25th, unless you were there inside his mind you would never know beyond all possible doubt what was going on in his mind.

Gray contends that because he "was the only person who could provide information as to what was on his mind," the third paragraph of the preceding soliloquy constituted an impermissible reference to his decision not to testify. In context, it is apparent that the prosecution sought to highlight for the jury the fact that the government was not required to prove guilt beyond all possible doubt. The government was stating the obvious. What A person "intends" or "knows" can never be proved by the government beyond *all* doubt. The prosecutor in this case was simply trying to explain the rationale for his burden of proof, rather than calling attention to Gray's decision not to testify. The government's arguments were not improper.

2. *Evidence Not In The Record*

Gray also alleges that statements made by the prosecution were impermissible because they were not based upon facts properly adduced at trial. We review a district court's determination that rebuttal statements constitute permissible inferences for an abuse of discretion. *United States v. Patel*, 762 F.2d 784, 794 (9th Cir.1985).

Gray contends that the following statements made during closing argument contain evidence not in the record:

> Finally, as if your common sense would not be enough at this point, consider this, consider this: Two and a half months after Raymond Gray failed to appear for his sentencing on the 25th at

> 1 o'clock, he's arrested. Where is he arrested? He's arrested in Mexico. An arrest warrant. You've heard this. An arrest warrant was outstanding for three months.
>
> Now do you think – common sense again – do you think that the United States Marshal Service could not have found and arrested Mr. Gray for three months if Raymond Gray were not hiding, ultimately hiding in Mexico?

Gray contends that there was no evidence that he was "hiding" in Mexico.

The prosecution is granted reasonable latitude to fashion closing arguments. *Patel*, 762 F.2d at 795. Although it is improper to base closing arguments upon evidence not in the record, *United States v. Artus*, 591 F.2d 526, 528 (9th Cir.1979), prosecutors are free to argue reasonable inferences from the evidence. *United States v. Polizzi*, 801 F.2d 1543, 1558 (9th Cir.1986).

Although no one testified that Gray had been hiding in Mexico, the evidence showed that a warrant for Gray's arrest was outstanding for approximately three months after his sentencing date until he was arrested in Mexico. The inference that Gray was hiding in Mexico was certainly reasonable in light of the evidence presented. The government's closing argument did not contain an impermissible inference.

3. *Arguments Beyond The Scope Of Rebuttal*

Gray also argues that certain statements by the prosecution exceeded the allowable scope of rebuttal. We review district court determinations regarding the proper

scope of rebuttal closing argument for an abuse of discretion. *See United States v. Chavez-Vernaza*, 844 F.2d 1368, 1376 (9th Cir.1987) (district court limitation on the scope of cross-examination is reviewed for an abuse of discretion); *see also Patel*, 762 F.2d at 794. It is "fair advocacy" for the prosecution to advance an argument in rebuttal to which the defendant has opened the door. *United States v. Lopez*, 803 F.2d 969, 972 (9th Cir.1986), *cert. denied*, 481 U.S. 1030, 107 S.Ct. 1959, 95 L.Ed.2d 530 (1987).

Gray contends that "by referring to Mr. Gray's arrest in Mexico, the prosecutor exceeded the permissible scope of rebuttal argument since the defense summation made no reference to Mr. Gray's arrest in Mexico." In Gray's closing argument, however, his counsel stated that certain elements of the crime of failing to appear were in dispute. Specifically, he stated that the disputed elements were whether Gray was aware of his sentencing date and his obligation to appear for sentencing, and whether Gray was willful in his failure to appear. Based on defense counsel's argument, Gray opened the door for the prosecution to argue that Gray's failure to appear was willful because evidence was presented that he was aware of his sentencing date and his obligation to appear and despite this he was in Mexico where he was arrested. Therefore, the statement was well within the proper scope of rebuttal argument.

D. *Sentencing*

Gray contends that the district court should have sentenced him under the Sentencing Guidelines. The applicability of the Guidelines is a question of law which

this court reviews independently, without deference to the district court's interpretation of the law. *See Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1011 (9th Cir.1987) (determinations of the scope of statutory requirements are reviewed *de novo*). The district court did not sentence Gray under the Sentencing Guidelines based on a previous ruling that the guidelines were unconstitutional.

The Supreme Court upheld the constitutionality of the Sentencing Guidelines in *Mistretta v. United States*, ___ U.S. ___, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). The Sentencing Guidelines are authorized by the Sentencing Reform Act of 1984. Sentencing Reform Act of 1984. Sentencing Reform Act of 1984, Pub.L. 98-473, 98 Stat. 2031. The effective date of the Act is November 1, 1987. *United States v. Rewald*, 835 F.2d 215, 216 (9th Cir.1987). The Sentencing Guidelines do not apply to conduct that occurred before November 1, 1987. *Id.*

Gray failed to appear for sentencing on September 25, 1987 and was arrested on December 8, 1987. Gray contends that the Sentencing Guidelines are applicable because the offense of failure to appear is a continuing offense which is committed throughout the period in which the defendant remains at large. The Sentencing Guidelines apply to offenses initiated before November 1, 1987, but not completed until after November 1, 1987. *United States v. Frank*, 864 F.2d 992, 1008 (3rd Cir.1988). Therefore, the Sentencing Guidelines are applicable to Gray if the crime of failure to appear is a continuing offense.

A tension exists between the doctrine of continuing offenses and the principle of repose inherent in statutes

of limitations. *Toussie v. United States*, 397 U.S. 112, 115, 90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970). The doctrine of continuing offenses essentially extends the statute of limitations beyond its stated term. Because of this tension, the Supreme Court has established "that the doctrine of continuing offenses should be applied in only limited circumstances." *Id*. The Court, however, went on the explain that:

> These considerations do not mean that a particular offense should never be construed as a continuing one. They do, however, require that such a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one.

*Id*. After analyzing the language of the Universal Military Training and Service Act and the history of draft registration statutes, the Court in *Toussie* concluded that failure to register for the draft was not a continuing offense. *Id*. at 122-23, 90 S.Ct. at 864. To hold that failing to register for the draft was a continuing offense would effectively extend the applicable five-year statute of limitations. *Id*. at 121, 90 S.Ct. at 863. If Congress had intended a longer statute of limitations, it would have so provided. *Id*. at 123, 90 S.Ct. at 864.

The language of 18 U.S.C. § 3146(a) sheds no light as to whether Congress intended to classify failure to appear as a continuing offense. The statute simply states in pertinent part:

> Whoever, having been released under this chapter knowingly –

> (1) fails to appear before a court as required by the conditions of release; or
>
> (2) fails to surrender for service of a sentence pursuant to a court order; shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 3146(a) (1988 Supp.) The legislative history of the statute also fails to indicate whether failure to appear is a continuing offense.

The Supreme Court has determined, however, that escape from federal incarceration "is a continuing offense and that an escapee can be held liable for failure to return to custody as well as for his initial departure." *United States v. Bailey*, 444 U.S. 394, 413, 100 S.Ct. 624, 636, 62 L.Ed.2d 575 (1980). The Court in *Bailey* pointed out that because of "the continuing threat to society posed by an escaped prisoner," Congress must have intended that the crime of escape be treated as a continuing offense. *Id.* Moreover, the tension between the principle of repose and the doctrine of continuing offenses is absent from the crime of escape because "the statute of limitations is tolled for the period that the escapee remains at large." *Id.* at 413-14, 100 S.Ct. at 636-37.

We conclude that failure to appear is also a continuing offense. The statute of limitations for failure to appear is similarly tolled. 18 U.S.C. § 3290 ("No statute of limitations shall extend to any person fleeing from justice.") Moreover, a defendant who fails to appear for sentencing presents a threat to society analogous to that posed by an escaped prisoner. Both are convicted criminals obligated to serve sentences or facing sentencing. In addition, the failure of a defendant to appear for sentencing poses a threat to the integrity and authority of the court.

Our conclusion is supported by our decision in *United States v. Vowiell*, 869 F.2d 1264 (9th Cir.1989). In *Vowiell* we distinguished between the law applicable to escapees and the law applicable to those who assist escapees. We stated:

> Assisting escapees after the escape is complete constitutes a separate crime – harboring or concealing escapees. This separation reflects the different dangers which the two crimes pose – namely, helping to breach legal custody and obstructing justice. In contrast, no *separate* crime exists for not turning one's self in after escaping. As the Supreme Court pointed out in *Bailey*, an escapee can be held liable for not returning to custody, 444 U.S. at 413, [100 S.Ct. at 636,] but that conduct is included within the crime of *escape*. Not turning one's self in involves essentially the same danger as escaping – that someone who is supposed to be in legal custody will not fulfill the purpose of that custody.

869 F.2d at 1269 (emphasis in original) (footnote omitted). Similarly, no separate crime exists for failure to return for sentencing after having initially failed to appear for sentencing. The two actions pose the same danger to society and the legal system. Both are part and parcel of one continuing offense.

Because we conclude that failure to appear is a continuing offense and Gray must be resentenced under the Sentencing Guidelines, we need not address Gray's claim that the district court based its sentence upon erroneous information.

## III

## CONCLUSION

The judgment of conviction is AFFIRMED. This case is REMANDED to the district court with instructions that Gray be resentenced pursuant to the Sentencing Guidelines.

**APPENDIX B**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA | ) | No. 88-3159 |
| Plaintiff-Appellee, | ) | D.C. No. |
| vs. | ) | CR-88-35-JET |
| RAYMOND M. GRAY, | ) | ORDER |
| Defendant-Appellant. | ) | (Filed |
| | ) | Dec. 28, 1989) |

Before: ALARCON, THOMPSON, Circuit Judges, and TASHIMA*, District Judge.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing. Judges Alarcon and Thompson have voted to reject the suggestion for a rehearing en banc, and Judge Tashima so recommends.

The full court has been advised of the suggestion for an en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc in rejected.

---

* Honorable A. Wallace Tashima, United States district Judge for the Central District of California, sitting by designation.

## APPENDIX C

UNITED STATES DISTRICT CO.
CRIMINAL DOCKET
U.S. vs. GRAY, RAYMOND M.
CR88-35(C) ORIGINAL STD: April 1988

| 1988 | No. | V. PROCEEDINGS |
|---|---|---|
| Jan 20 | 1 | INDICTMNT |
| Jan 20 | 2 | ORDER (JLW)<br>Continuing detention |
| Jan 20 | 3 | LETTER<br>re: arraignmnt 1/28/88 |
| Jan 29 | 4 | MOTION<br>of Gov't for Detention Hrg. |
| Jan 29 | 5 | ENT (JLW)<br>ARRAIGNMENT:<br>AUSA B. Westinghouse: Def Cnsl B. Genego, W-1206. Def advised of rights & charges. Def pleads NOT GUILTY to Ct. I. Trial set 3-28-88, 9:30 a.m. (JCC) Pret. Mtns. due 2-12-88. Court orders Def detained |
| Feb 2 | 6 | ORDER (JLW)<br>of Detention. Cc & Ent. 2-2-88 |
| Feb 4 | 7 | MINUTE ORDER (JCC)<br>Transferring Case to Hon. Barbara J. Rothstein for all future proceedings. Cnsl will be adivsed by Court of new trial date. |
| Feb 4 | ** | Case transferred to Judge Rothstein |
| Feb 9 | 8 | ENT (BJR)<br>Trial set 4-4-88, 9:30 a.m. |

| | | |
|---|---|---|
| Feb 19 | 9 | APPLICATION<br>of William Genego to Appear as Cnsl Pro Hac Vice (Paid) |
| Feb 19 | 10 | DECLARATION<br>of William Genego in support of Application Pro Hac Vice |
| Feb 19 | 11 | STATEMENT<br>of Local Cnsl John Muenster in support of Applic. Pro Hac Vice |
| Feb 24 | 12 | ENT (BJR)<br>GRANTING William Genego's Applic. to Participate Pro Hac Vice |
| Mar 18 | 13 | ENT (BJR)<br>Matter transferred to Judge Tanner for trial. Trial set 4-4-88, 9:00 a.m. Cnsl to contact Debbie Harrison for future proceedings |
| Mar 18 | ** | Transferred case to Judge Tanner w/JS-3 card. |
| Mar 29 | 14 | MOTION<br>D's for leave to file PTM to re-assign case<br>NOTED 4/8/88 |
| Mar 29 | 15 | MOTION & MEMO<br>D's to reassign case in support of motion<br>NOTED 4/8/88 |
| Mar 29 | 16 | MOTION<br>D's to short time re:mtn to reassign case<br>NOTED 3/31/88 |
| Mar 29 | ** | LODGED – ORDER<br>short time re: mtn to reassign |
| Mar 29 | 17 | MOTION<br>D's to short time NOTED 3/31/88 |
| Mar 29 | ** | LODGED – ORDER<br>short time |

| | | |
|---|---|---|
| Mar 31 | 18 | TRIAL BRIEF<br>(Govt) |
| Mar 31 | 19 | MEMO<br>(Govt) in opp ri Defs motion to reassign case |
| Apr 1 | 20 | NOTICE<br>Govt of intent to use stmnts |
| Apr 1 | 21 | REQ. INSTR.<br>by Govt. |
| Apr 1 | 22 | MEMO<br>by Def on reasonable doubt |
| Apr 1 | 23 | INSTR<br>by Def proposed w/citations |
| Apr 1 | 24 | INSTR<br>by Def without citations |
| Apr 4 | 25 | INSTRUCTION<br>DEFT GRAY'S Supplemental proposed jury (w/o cites) |
| Apr 4 | 26 | INSTRUCTION<br>DEFT GRAY'S supplemental proposed jury (w/cites) |
| Apr 4 | 27 | TRIAL BRIEF<br>D's |
| Apr 4 | 28 | RETURN<br>on sub issued to Kent Robison for trial served 3/29/88 |
| Apr 4 | 29 | ENT (JET) TRIAL<br>AUSA: Wales; DEFT: Genengo/Muenster; CR: Frederickson; Deft pres w/cnsl & in custody; Hrg on D's mtn to transfer DENIED; Hrg on D's mtn to suppress – Govt calls Kent Roison, Mtn DENIED; JURY SELECTED; open stmnts; Govt calls Kent Robison; Enrique Perez; Govt rests; Deft |

| | | |
|---|---|---|
| | | rests; Court takes exceptions to instructions; instructs jury; closing arguements by govt; Jury excused until 9:00 am 4/5/88 |
| Apr 5 | 30 | ENT (JET) TRIAL<br>AUSA: Wales; DEFT: Genegno/Muenster; CR: Frederickson; Deft pres w/cnsl & in custody; Further discussion re: instruction by Deft; Closing arguments; Jury retires to deliberate (9:55 am); Deft moves for acquittal DENIED; for mistrial RESERVED (11:00 am) jury returns w/verdict of GUILTY; SENTENCING set 6/24/88 at 9:00am Deft remanded; Deft submit papers re: mistrial |
| Apr 5 | 31 | WITNESS LIST<br>G's of trial |
| Apr 5 | 32 | EXHIBIT LIST<br>of trial |
| Apr 5 | 33 | JURY INSTRUCTIONS<br>Court's |
| Apr 5 | 34 | JURY INSTRUCTIONS<br>Deft's – proposed No. 6 (handwritten accepted per Judge Tanner) |
| Apr 5 | 35 | JURY LIST |
| Apr 5 | 36 | VERDICT<br>of Guilty to Ct I |
| Apr 12 | 37 | MOTION<br>Deft's to extend time to file motion for new trial NOT NOTED – CNSL ADV |
| Apr 15 | 38 | NOTICE<br>of mtn for new trial noted for 4/22/88 |
| Apr 28 | 39 | ORDER (JET)<br>D mtn 2 extent time to file mtn for new trial GRANTED; Motion to be filed by 5/23/88 |

| | | |
|---|---|---|
| May 9 | 40 | RETURN<br>on Sub issued to Enrique Perez on 3/30/88 |
| May 13 | 41 | TRANSCRIPT<br>of proceedings on 4/4/88 and 4/5/88 b4 JET |
| May 24 | 42 | MOTION<br>D's to file new trial mtn one day late; ntd for day of sentencing 6/24/88 |
| May 24 | 43 | MOTION/MEMO<br>D's for mistrial/new trial; ntd for day of sentencing 6/24/88 |
| June 6 | 44 | RESPONSE<br>G's to D's mtn for mistrial and for new trial |
| June 7 | 45 | MOTION & MEMO<br>D's for applicatio of sentencing commission guidelines to sentencing in support of mtn NTD: 6/24/88 |
| June 21 | 46 | SENT MEMO & OPPOSITION<br>G's to D's mtn for applicatio of sent guide |
| June 24 | 47 | ENT (JET)<br>AUSA: Westinghouse; DEFT Genego; CR: Frederickson; Deft pres w/cnsl& in custody; Deft mtn for new trial DENIED; mistrial DENIED |
| | | JDMT: 5 yrs<br>$250,000 fine<br>$50 CVF assessment |
| June 27 | ** | LODGED – J&C<br>to JET 6/28/88 |
| June 29 | 48 | JUDGMENT & COMMITMENT<br>c/c USM USP EOD 6/29/88 |

| | | |
|---|---|---|
| July 5 | 49 | NOTICE<br>of appeal by Deft – pro se |
| July 15 | 50 | ORDER<br>for schedule on appeal<br>trans ordered 8/5/88; filed 9/5/88<br>APlt brief 10/14/88; APle brief 11/14/88<br>Aplt reply 11/28/88 |
| July 22 | | CCA number 88-3159 assigned this appeal |
| Sept 19 | 51 | TRANSCRIPT<br>of 4/4/88 trial – Vol I |
| Sept 19 | 52 | TRANSCRIPT<br>of 4/5/88 trial – Vol II |
| Sept 19 | 53 | TRANSCRIPT<br>of 6/24/88 hearing b4 JET re: new trial |

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Present: THE HONORABLE BARBARA J. ROTHSTEIN,
U.S. DISTRICT JUDGE

Elizabeth Tyree Date: 18 March 1988
Deputy Clerk Court Reporter

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff<br>vs.<br>RAYMOND M. GRAY,<br>Defendant | Cause Number<br>CR88-35RT |

In Chambers
Proceedings: This matter is hereby transferred to U.S. District Judge Jack E. Tanner for trial. Trial in this matter shall commence on Monday, 4 April 1988 at 9:00 a.m. All pleadings filed in this matter in the future shall bear the cause number CR88-35RT.
Counsel shall contact Judge Tanner's clerk, Debbie Harrison, concerning any future scheduling in this matter.

cc. counsel of record
USPO

Minute Entry
18 March 1988

Entered By: /s/ Elizabeth Tyree
Elizabeth Tyree

## APPENDIX D

REPORTER'S TRANSCRIPT

* * *

(p. 7) judge for them, and that the public, therefore, will have more confidence in an impartial judicial process. And that's defeated when, in contravention of the rule, cases are reassigned amongst judges.

THE COURT: I assume, then, that your argument is not based either on 28, 144 or 455?

MR. GENEGO: No, Your Honor, we are not alleging any particular basis for disqualification.

THE COURT: All right.

MR. GENEGO: But simply a violation of the rule.

THE COURT: All right, then, the motion is denied. Any other motions?

THE COURT: Defendant? Government?

MR. WALES: Your Honor, we have no motions before the Court. I believe that the –

THE COURT: We have the question of the motion in limine on the lawyer-client relationship.

MR. GENEGO: Yes, we do, Your Honor, both on the lawyer-client relationship, as well as the documents that were reportedly seized from Mr. Gray, and a statement that was reportedly made by Mr. Gray.

THE COURT: Are you making that under search and seizure?

MR. GENEGO: Yes, we are, Your Honor, both search and seizure –

* * *

(p. 50) Q. Was Mr. Gray present?

A. No, sir.

THE COURT: All right.

Counsel, cross-examination.

MR. GENEGO: I don't believe we need to cross-examine right now for purposes of this preliminary proceeding. I would be willing to proceed with my objections on the basis of the record that's been established so far.

THE COURT: It's in the record. It will be overruled, denied. He will be allowed to testify.

MR. GENEGO: To the limited facts that the Court has identified?

THE COURT: Every time he notified his client of that sentencing date, it will be admissible.

MR. GENEGO: All right. I just want to make sure the Court understands my objection, that even if the testimony is limited to that passing on of information, that under the "last link" doctrine and under the incrimination rationale, that piece of evidence, that pass-along information is going to be – it's the last link, it's the last piece of evidence that the government's got to put in the failure-to-appear charge, and at that point they've got guilt, and, therefore, under *Bierman* and *Twist*, it should be excluded.

THE COURT: All right. I just don't think those cases are applicable. Different case, different facts.

(p. 51) MR. GENEGO: Well, I've already –

THE COURT: You've made the record. I don't know how you can make it any clearer.

MR. GENEGO: Neither do I, Your Honor,

THE COURT: Okay.

MR. WALES: Your Honor, just so I understand the Court's earlier ruling, with respect to the indictment, the Court will permit us to introduce the indictment and to sketch, in a 15-second, 20-second fashion, the nature of the charges?

THE COURT: Yes, yes.

MR. WALES: Thank you.

THE COURT: Anything else?

The witness may step down.

Are we ready for the jury? Is there another matter to take up?

MR. GENEGO: I believe we still have the question about the marshals and the marshals' statements. If he is going to present those statements, I would like a pretrial determination of that issue.

THE COURT: Well, he assures the Court he's not going to do it in his case in chief, so then the question is, I don't know if you're entitled to a hearing on rebuttal.

Can you point out something in the rules, if he presents such evidence on rebuttal, you're entitled to a hearing ahead

* * *

(p. 123) MR. WALES: Your Honor, this, I will represent as well, also is a certified copy, and we will move its admission at this time.

MR. MUENSTER: No objection to 1, Your Honor.

THE COURT: Admitted.

[Plaintiff's Exhibit 1 admitted.]

Q. Just a couple of other questions about this Appearance Bond, Mr. Robison.

First, do you see a section, sir, marked Court Appearances at the top?

A. Yes, I do.

Q. Would you read to the jury, please, what is stated in that section?

MR. MUENSTER: Objection, Your Honor, the document speaks for itself.

THE COURT: He may read it.

A. That area is designated Court Appearances and reads:

> "I must appear in court at the United States Courthouse, 4th Floor, Seattle, on October 14th, 1986, 9:30 . . . "

Q. Okay. Now, let me ask you to pause there for just a moment. Do you recall, sir, whether October 14th, 1986, was the original trial date in this matter?

A. That's my recollection, yes.

Q. Now, the trial didn't take place on October 14th?

(p. 124) A. No, it did not.

Q. All right. Now, please continue reading after the 9:30 a.m.

A. " . . . and at all other hearings in this case, including turning myself in to begin serving a sentence, should that occasion arise. I understand that a willful failure to appear in court at a time set for hearing is a separate criminal offense, punishable by up to five years imprisonment and a fine of $250,000."

Q. Thank you. And finally, directing your attention toward the bottom of the document, right above Mr. Gray's signature, do you see a section marked Agreement by Defendant?

A. I do.

Q. Would you read us that, please?

A. Agreement by Defendant:
"I understand and agree to comply with every condition marked above, and I understand that if I fail to comply with any conditions of my release, the Court will immediately issue a warrant for my arrest, and I will be subject to revocation of release, an order of detention, and prosecution for contempt of court. I understand the bond remains in effect during any proceeding on appeal or review."

Q. Thank you.

Let me hand you, sir, what's been marked Plaintiff's (p. 125) Exhibit No. 3, Mr. Robison. Would you tell us what that document appears to be?

A. This document is a superseding indictment.

Q. Naming Mr. Gray as well?

A. It does.

Q. Same case?

A. Yes.

Q. Relates to the same charges as previously discussed with respect to the original indictment?

A. Yes, it does. It simply restates some verbiage in one or more of the counts.

Q. Mr. Gray is still charged in eight counts with the charges that you have described already?

A. Yes, he was.

Q. And that, in fact, is the indictment on which Mr. Gray was tried; is that correct?

A. That's correct.

Q. Now, you have told us that the trial did not take place on October 14th as indicated in the Appearance Bond. When did the trial commence, do you recall?

A. It's my recollection it commenced the first week of March 1987.

Q. A little bit less than a year ago?

A. That's correct.

MR. WALES: And, Your Honor, if I may before (p. 126) proceeding, move the admission of Plaintiff's 3, also certified.

MR. MUENSTER: Objection to the relevancy of the superseding indictment, Your Honor.

THE COURT: It will be admitted.

[Plaintiff's Exhibit 3 admitted.]

Q. Now, before that judge was the case tried, Mr. Robison?

A. The Honorable Barbara Rothstein.

Q. Chief judge of this district?

A. That's correct.

Q. And where did the trial take place?

A. In Seattle.

Q. Why was the trial date delayed, sir?

MR. MUENSTER: Objection, relevance.

THE COURT: All right. I'll sustain the objection.

Q. How long did the case take to try, Mr. Robison?

A. Case took, I think, a little more than three months to try to verdict.

Q. And can you tell us, sir, approximately the number of witnesses and documents involved in the case?

MR. MUENSTER: Objection as irrelevant to the number of witnesses and documents.

THE COURT: Sustained, sustained.

Q. Did there come a time, Mr. Robison, when the jury reached a verdict?

(p. 127) A. Yes.

Q. Would you tell us, please, what the verdict was?

A. I can tell you as to Mr. Gray, the Jury –

MR. MUENSTER: Objection. I object to this witness testifying to the verdict unless it's within his personal knowledge.

MR. WALES: Well –

MR. MUENSTER: May I ask a question on voir dire of the witness?

MR. WALES: Your Honor, perhaps I could foreshorten this.

THIS COURT: I've got one objection; right?

MR. MUENSTER: I can make my objection clear by asking the witness a question.

THE COURT: Go ahead.

MR. MUENSTER: Sir, were you present at the verdict?

THE WITNESS: No, sir.

MR. MUENSTER: That's my objection, Your Honor

MR. WALES: Your Honor, I was simply trying to foreshorten matters. May I approach the witness?

THE COURT: Yes.

Q. Let me hand you what's been marked Plaintiff's Exhibit No. 5, Mr. Robison. Would you describe that document to the jury, please?

A. This document is a file stamped copy of a verdict filed (p. 128) June 3rd, 1987, in the matter of United States of America, plaintiff, v. Raymond M. Gray, defendant.

Q. This is the verdict form with respect to Mr. Gray; is that correct?

A. That's right.

MR. MUENSTER: Objection to the form of the question as leading.

THE COURT: He may answer.

A. It is a verdict form as to the defendant, Raymond M. Gray.

Q. And it is a certified copy, is it not?

A. Yes, it is.

MR. WALES: Your Honor, at this time, we would move the admission of Plaintiff's Exhibit No. 5.

THE COURT: 5's admitted.

MR. MUENSTER: Please note my objection for lack of authentication through this witness, Your Honor.

THE COURT: Yes, yes, noted.

[Plaintiff's Exhibit 5 admitted.]

Q. Now, Mr. Robison, you have an admitted verdict form in front of you. Can you tell us what the verdict of the jury was with respect to Mr. Gray?

A. Exhibit 5 reflects the jury found Mr. Gray guilty of all eight counts.

Q. After the verdict was returned, Mr. Robison, was a sentencing date set?

(p. 129) A. A sentencing date was set, yes.

Q. Do you recall approximately when that date was?

A. It's my recollection that the original sentencing date was sometime in July of 1987.

Q. Did the sentencing take place in July?

A. No, sir, no, it did not.

Q. It was continued?

A. It was.

Q. Do you know what date it was continued?

A. Originally continued until September 18th of 1987.

Q. Did it take place on September 18th?

A. No, it did not.

Q. It was continued again?

A. It was continued for another week.

Q. To what precise date in time, sir?

A. It was continued until September 25th, 1987, to commence at 1:00 p.m.

Q. And how did you learn of that continuance?

A. I was notified by the Court.

Q. After you learned of the continued date to September 25th, 1987, at 1 o'clock in the afternoon, am I correct?

A. That's correct.

Q. Did you contact Mr. Gray?

A. I did.

Q. What did you tell Mr. Gray?

(p. 130) A. I notified him of the new sentencing date.

Q. Did you tell him whether he would be required to appear?

A. Yes.

MR. MUENSTER: Objection.

THE COURT: Yes, he may answer, he may answer.

MR. MUENSTER: The grounds argued this morning, Your Honor.

THE COURT: He may answer.

Q. I'm sorry, Mr. Robison, did you tell Mr. Gray that he would be required to appear on September 25th at 1 o'clock in the afternoon?

A. Yes, I did.

MR. MUENSTER: Same objection, Your Honor.

THE COURT: Same ruling.

Q. Still trying to get Mr. Robison's answer.

A. Yes, I did. Yes, I did.

Q. Thank you.

Did you have occasion, sir, in the days prior to September 25th, 1987, to remind Mr. Gray of the sentencing date, September 25th at 1 o'clock in the afternoon?

MR. MUENSTER: Objection to the form of the question as leading, Your Honor.

THE COURT: Overruled. He may answer.

A. I did.

Q. And did you have occasion, sir, to again tell Mr. Gray (p. 131) that his appearance would be required?

MR. MUENSTER: Same objection.

THE COURT: Overruled. He may answer.

A. Yes.

Q. Did you communicate this information to Mr. Gray in person, over the telephone or by letter?

A. I communicated both telephonically with Mr. Gray, as well as personally, and I'm reasonably certain that our office sent out a letter.

Q. Why would you be reasonably certain, sir?

A. It's a matter of practice in my office that every court date the client is notified in writing automatically.

Q. Automatically?

A. Yes.

Q. Now, Mr. Robison, that brings us to September 25th, and I want to ask you a couple of questions about that date, sir, if I may.

First, what was the maximum penalty Mr. Gray was facing at the time of sentencing?

MR. MUENSTER: Objection to the relevancy.

THE COURT: He may answer. He may answer.

A. Up to 45 years in imprisonment and thousands of dollars of fines.

Q. Did you inform Mr. Gray of that information?

MR. MUENSTER: Objection.

(p. 132) THE COURT: He may answer.

MR. MUENSTER: For the grounds set forth this morning, Your Honor.

THE COURT: Yes. He may answer.

A. Yes. Throughout the proceedings, he was made aware of that, yes.

Q. Now, with respect to September 25th, Mr. Robison, let me direct your attention in particular to 1 o'clock in the afternoon. Would you tell the ladies and gentlemen of the jury where you were at 1 o'clock in the afternoon on September 25th last year?

A. I was in Judge Rothstein's courtroom.

Q. Was Judge Rothstein present?

A. Yes.

Q. Was the government represented?

A. Yes.

Q. Was Mr. Gray's sentencing called?

A. Yes, it was.

Q. Was Mr. Gray present?

A. No, he was not.

Q. Did the sentencing take place?

A. Mr. Gray's sentencing did not take place.

Q. Do you know, Mr. Robison, where Mr. Gray was?

MR. MUENSTER: Objection.

MR. WALES: Calls for personal knowledge, if the

* * *

(p. 136) deliberations, did you prepare a document for Ray to sign which excused him from appearing in court?

A. I prepared a document which relieved Mr. Gray of the necessity to be present when the jury returned its verdict.

MR. MUENSTER: May I approach the witness, Your Honor?

THE COURT: Yes.

MR. MUENSTER: Thank you.

Q. Mr. Robison, could you take a look at the document which has been marked Defendant's Exhibit A-4 for

identification, and tell us whether or not you have seen that before?

A. I have seen it.

Q. And could you tell us what it is, please?

A. This appears to be a handwritten waiver that I prepared in court for Judge Rothstein at her request.

Q. All right. And it's a handwritten waiver of what, specifically?

A. We asked permission of Judge Rothstein that we be able to return to Reno and Lake Tahoe, respectively, in the event the jury was out a number of days, and Judge Rothstein granted our request on the condition that we file with her court a written waiver by Mr. Gray of his right to be present when the jury returned its verdict.

Q. And that document also excuses you from appearing at the time the jury returns its verdict, does it not?

(p. 137) A. Yes, it does.

Q. All right. And this document was handwritten by yourself?

A. Yes.

Q. And does it bear Mr. Gray's signature on it?

A. Yes.

Q. Does it also bear your signature on it?

A. Yes, sir.

Q. And does it bear the word "approved" next to your signature?

A. It does.

Q. And does it carry a date with it?

A. May 28th, 1987.

Q. Is that the date that the document was signed by yourself and by Mr. Gray?

A. Yes, I believe so.

Q. Was that waiver filed with Judge Rothstein's court?

A. It was given to her clerk.

Q. Given to her clerk?

A. Yes.

MR. MUENSTER: All right. Move to admit Defendant's A-4, Your Honor.

MR. WALES: No objection.

THE COURT: Admitted.

[Defendant's Exhibit A-4 admitted.]

Q. What's the first sentence of that document? Could you (p. 138) read that for us, sir?

A. Certainly.

"I, Raymond M. Gray, do hereby waive my presence at subsequent proceedings in this matter, specifically the return of the verdict."

Q. All right. You have told us that there was a sentencing date set sometime in July of 1987, am I correct?

A. That's my recollection, yes.

Q. And do you recall what the exact date of the sentencing is?

A. No, sir. No, I do not.

Q. Did Mr. Gray appear in court on that date in July?

A. No.

Q. And was that because you told him it was not necessary to appear on that date?

A. I assume so. I told him it was not necessary since it had been vacated and continued.

Q. All right. And then, if I understand your testimony correctly, there was another sentencing date set – strike that.

This sentencing date in July, that was set by the Court, and the lawyers were told about it?

A. I was told about it, sir.

Q. You were told about it. How did you learn about it, by mail?

* * *

(p. 141) whether or not you recognize that document?

A. I recognize the document.

Q. And what is it?

A. It is a notification from Judge Rothstein's clerk that the sentencing for Mr. Gray and the other defendants had been continued to September 25th, 1987, at 1:00 p.m.

Q. All right. And who is the notification addressed to? Who received copies of the notification as indicated in that document?

A. It's not addressed to anyone. It is copied to counsel of record.

Q. All right. Counsel of record, that's the lawyers involved in the case?

A. Yes, sir.

Q. How about Mr. Gray, does his name show up as being mailed a copy of that?

A. No, sir.

Q. Did you send him a letter from your office sometime between September 18th and September 25th telling him about this new change in the court date?

A. That would have been our practice, yes.

Q. Do you have any recollection now as to whether such a letter was ever sent by your office?

A. I do not recall signing a specific letter to Mr. Gray, but I can only tell you that would have been our practice.

* * *

(p. 148) which you've already examined, and the bond was continued after that time, was it not?

A. That's correct.

MR. MUENSTER: Objection to the form of the question as leading.

THE COURT: It may stand.

Next question.

Q. Did you ever tell Raymond Gray, Mr. Robison, that the conditions of the Appearance Bond were no longer in effect?

MR. MUENSTER: Objection, beyond the scope of cross.

THE COURT: He may answer. He may answer.

A. No, they were always in effect. I told him – the Appearance Bond conditions were always in effect.

Q. Now, let me direct your attention to this waiver to which Mr. Muenster referred. I believe it's marked Defendant's Exhibit A-4.

A. Yes.

Q. Is that right, A-4?

A. That's correct, A-4.

Q. Now, would you tell us, sir, about the circumstances leading to the preparation of that waiver?

MR. MUENSTER: Objection on relevancy grounds, Your Honor.

THE COURT: He may answer.

A. The trial had proceeded for, as I indicated, three months, (p. 149) over three months. It was quite evident that the jury would be out a while, because there was so much documentation, so much material to consider.

And two of the attorneys, myself and another one, were from out of state, and we asked for permission to go

ahead and go home and just have the jury return its verdict and us notified.

The Judge concurred with our request, but as a condition of that concurrence, requested that we put something in writing in the file signed by our clients to the effect that they agreed and they waived their presence in court when the jury came back and returned its verdict.

And as a result of Judge Rothstein's request for that written waiver, I of course, didn't have a secretary right there, so we just hand wrote this out, and I had Mr. Gray execute it, and I signed it myself, and we gave it to the Court's clerk.

Q. Was Mr. Gray present during that colloquy, that discussion with Judge Rothstein?

A. Yes.

Q. In open court?

A. In open court.

Q. Now, with respect to the preparation of the waiver itself, sir, I believe you have told us that it bears your handwriting, aside from Mr. Gray's signature: is that right?

(p. 150) A. Yes.

Q. Did you discuss the language contained in the waiver with Mr. Gray?

A. I believe I did.

Q. Directing your attention, sir, specifically to the language at the outset, "I, Raymond M. Gray, do hereby

waive my presence at subsequent proceedings in this matter, specifically the return of the verdict," did you discuss that language with Mr. Gray?

A. I did.

Q. Did you tell him specifically to what that referred?

A. Yes. Yes, I did.

Q. Would you tell the jury, please, what you told Mr. Gray?

A. We were –

MR. MUENSTER: Objection, Your Honor.

THE COURT: He may answer.

A. – discussing this in the context of how long the jury would be out.

Q. Which you did not know; correct?

A. We did not know. We felt it could be anywhere from a week to several weeks because of the length of trial. And Mr. Gray and I both wanted to return to Reno, to return to business while the jury was deliberating, and I sought Mr. Gray's input when I asked the Court for permission to leave Seattle.

And he sat – he was sitting next to me at counsel table

* * *

(p. 152) THE COURT: He may answer, he may answer.

A. To the best of my recollection, I did.

Q. Did you have a conversation with Mr. Gray, Mr. Robison, after the time that this waiver was executed and before you told him that his appearance would be required at the sentencing, when you indicated to him that his presence might be required in Seattle for another purpose?

A. I did so as I prepared this document.

Q. All right.

A. It says so right here.

Q. And what is that, sir?

A. Well, it says:

"Mr. Gray waives my presence at subsequent proceedings in this matter, specifically the return of the verdict. I do so after having been fully advised by my attorney to be present in all stages of the trial."

That was part of the discussion that – and it was very important to Mr. Gray to be present at every single stage, at arraignments, at motions. He was adamant about that, that he wanted to show Judge Rothstein that he was a good candidate for his Appearance Bond. And it was very important for him to be present, actually physically present so Judge Rothstein would visualize his presence. And that's why we carefully drafted this document as we did.

* * *

(p. 154) notified Thursday afternoon that my presence was required up here, and that a subpoena had been

served on my office. When I got back to my office Friday, we went to get Mr. Gray's files out of our warehouse when we found that our two runners, both of which are college students, were gone for the weekend and they were the only ones that had keys.

Q. Were you requested to bring those letters.

A. Yes, we were requested to bring those letters.

Q. And finally, on this line, Mr. Robison, you have told us that you can't recall – I think you told Mr. Muenster you could not specifically recall signing the letter in July, the letter for September 18th or the letter for September 25th, but that you were confident that they had been sent, it was automatic.

Is there any question, letters aside, Mr. Robison, any question in your mind as to your earlier testimony that you told Raymond Gray that he had to be present on September 25th at 1 o'clock?

MR. MUENSTER: Objection, Your Honor, this is repetitious.

THE COURT: He may go into it. You may ask the question. You may answer it.

A. Uh, there was no question that I told him. There is no question that we discussed it the day before I left for Seattle in my parking lot. We discussed in detail not only (p. 155) his presence but the entire strategy involved and his participation in the sentencing on the next day at 1 o'clock.

Q. All right. And let me direct your attention, Mr. Robison, to that evening, sir, the evening of the 24th. Did you have another conversation with Raymond Gray?

MR. MUENSTER: Objection, Your Honor, beyond the scope of the cross, repetitious of the direct.

THE COURT: Are you talking about the evening of the 24th?

MR. WALES: Yes, I am.

THE COURT: He may answer.

A. I was in my room at the Crown Plaza. I received a phone call.

Q. All right. Who was the phone call from?

A. It was from Ray.

Q. Would you tell us, please, what Mr. Gray said to you?

MR. MUENSTER: Objection, Your Honor.

THE COURT: You may answer.

MR. MUENSTER: I would object for the reasons that we discussed earlier in the proceedings today.

THE COURT: He may answer.

MR. MUENSTER: Thank you.

A. Ray indicated to me that he was in Seattle, that he was at the Madison-Stouffer, that we were on for a meeting with Mr. Schwartz, I believe is his name, for 7:30 in the coffee shop (p. 156) at the Madison-Stouffer the following morning.

Q. Now, the federal courthouse in Seattle is on the corner of Fifth and Madison, is it not?

A. That's correct, somewhere.

MR. MUENSTER: Objection to the form of the question as leading.

THE COURT: Oh, he may answer.

Q. Where is the Madison Hotel, sir, the Stouffer-Madison Hotel in relation to the federal courthouse?

A. It's across the street.

Q. Directly across the street?

A. Directly.

Q. And Mr. Gray told you he was at the Stouffer-Madison, calling from there at 11 o'clock the night before?

A. I don't know if he called me from there, but that's where he said he was.

Q. He told you he was there?

A. That's what he said.

Q. Now, with whom were you to meet, according to Mr. Gray, on the morning of the 25th?

A. Mr. Genego, Mr. –

MR. MUENSTER: Objection, once again, Your Honor, beyond the scope. It's irrelevant.

THE COURT: All right. I'll sustain that.

MR. MUENSTER: Thank you, Your Honor.

* * *

(p. 191) both aware that he was required to appear at 1 o'clock on September 25th and that he willfully did not appear.

I say that with such confidence, ladies and gentlemen, because Kent Robison, an attorney with years of experience going into 16, going on 17 years of experience as litigator, as a trial lawyer, representing many, many, many defendants over the years, has told you a number of things.

First, he's told you that it was his habitual practice – he always did this – to send a letter to his client telling his client when his client was going to be required to appear for sentence. He's told you that he doesn't have those files right now because he just found out last Thursday that he was supposed to appear and the files are in storage. C'est la vie.

I submit to you that if you watched him testify, you know that he's not hiding the ball. There is no hidden rabbit in this case. There is no reason why Mr. Robison would not have produced that letter if he honestly could have done so. He has told you it's his habitual practice to send the letter.

He's also, I think very honestly, told you that he can't honestly remember signing the letter, and I think that's, if anything, an indicator of how truthful he is, in fact, being with you, because who among us remembers signing a letter six months or nine months ago, one letter among many, among all of his letters that he sends to all of his clients. But he's

* * *

(p. 219) about who knows what, the case takes two days instead of one day, calendars get jammed, there are all kinds of reasons why cases don't always begin on the day when they're originally scheduled to begin. Common sense tells you that.

Now, let me just touch, if I could, on a couple of points made by Mr. Muenster.

First, he has again pointed to Mr. Robison's statement on the morning of the 25th that he talked to his client that morning, his statement in court to Judge Rothstein. Who knows why Mr. Robison made that statement? He didn't know. He was sitting on the witness stand.

I think you could look at him and know that he was doing the very best he could to tell you the truth as he best recalled it. And he didn't know why he said that. Maybe it was because he talked to his client late the night before, as he told you, and he thought that it was early morning instead of late in the evening. Who knows?

I submit to you, ladies and gentlemen, it has absolutely no significance for this, case, because Mr. Robison is an attorney in long standing, 16, 17 years' experience. He has tried any number of cases. He well knows the penalty for perjury when he's sitting on the witness stand, and he is not, ladies and gentlemen, going to get on the witness stand and risk his license and liberty, if you will, his license to practice law and his liberty by perjuring himself. He's

* * *

## APPENDIX E

AFFIDAVIT OF
JO ANN OLIVER

STATE OF WASHINGTON )
: ss
COUNTY OF KING )

I, Jo Ann Oliver, being first duly sworn and upon my oath, depose and say:

1. I am an Assistant Federal Public Defender who was appointed to represent Charles Noel Hernandez who was charged in a four-court indictment in cause number CR88-72R.

2. Mr. Hernandez and his co-defendant, Hugo Alberto Cardenas, were arraigned on April 17, 1988. At that hearing a jury trial was scheduled for May 9, 1988 before the Honorable Barbara J. Rothstein. The pretrial motions due date was set for April 31, 1988.

3. On April 14, 1988 the in-court clerk for Judge Rothstein, Elizabeth Tyree, entered a minute order transferring cause number 88-74R to United States District Judge Jack E. Tanner in Tacoma, Washington.

4. Because Judge Tanner's court schedule would not accommodate the original trial date of this matter, the trial was rescheduled for June 6, 1988. On that date both defendants entered pleas of guilty to two counts of the indictment.

5. I was also appointed to represent Patrick Eugene Sanders in his criminal case number CR88-149R. Mr.

Sanders' indictment charged him with eight counts of distribution of a substance containing cocaine base.

6. Mr. Sanders intended to exercise his constitutional right to a jury trial.

7. On June 16, 1988 Mr. Sanders was arraigned. His case was assigned to the Honorable Barbara J. Rothstein. The trial date was August 8, 1988. On July 28, 1988 Judge Rothstein's in-court clerk, Elizabeth Tyree, telephoned counsel for Mr. Sanders and inquired whether the matter would go to trial or be disposed of with a guilty plea. When I told her it was Mr. Sanders' intention to go to trial, Ms. Tyree told me that if it went to trial, the case would probably be transferred to Judge Tanner.

8. I asked Ms. Tyree why the case would have to be transferred. Ms. Tyree told me that the Court had two trials scheduled on August 8; one was Mr. Sanders' criminal trial and the other was a civil trial. She said that the following two weeks Judge Rothstein would be out of town at the Ninth Circuit Judicial Conference and on vacation. When I asked Ms. Tyree whether or not the criminal case of Mr. Sanders should not receive precedence, Tyree said that it was a matter of routine to transfer criminal cases to Judge Tanner.

9. On August 1, 1988 I discussed the probability that the defendant's trial would be before Judge Tanner with Mr. Sanders. Based on my advice to him, Mr. Sanders instructed me to contact the Assistant United States Attorney regarding a plea offer. A plea agreement was reached with Mr. Diskin that same day.

10. On that same date, August 1, 1988, I telephoned Ms. Tyree to schedule a hearing for the guilty plea. It was scheduled for the next morning. In that telephone conversation, I told Ms. Tyree that we were entering the plea of guilty to avoid the transfer of the case to Judge Tanner. Ms. Tyree replied that she had only said that the case might be transferred.

11. On August 2, 1988 Mr. Sanders entered a plea of guilty to two counts of the indictment and is presently awaiting sentencing before Judge Rothstein.

/s/ Jo Ann Oliver

SUBSCRIBED AND SWORN to before me this 26th day of September, 1988.

/s/ Virginia A. Dailey
NOTARY PUBLIC in and for the state of Washington, residing at Seattle.
My appointment expires 7-8-89.

---

AFFIDAVIT OF
MICHAEL G. MARTIN

STATE OF WASHINGTON )
: ss
COUNTY OF KING )

I, Michael G. Martin, being first duly sworn and upon my oath, depose and say:

1. I am the Chief Assistant Federal Public Defender for the Western District of Washington. On March 30, 1987 I was appointed to represent Craig Stephen Bryant in Cause number CR87-89R.

2. Mr. Bryant was arraigned before United States Magistrate Philip K. Sweigert on April 27, 1987. At that time a trial date was set for June 22, 1987 before the Honorable Barbara J. Rothstein.

3. Subsequent to the arraignment and prior to June 17, 1987, I entered into plea negotiations on behalf of Mr. Bryant. After having reached an agreement with the government, I was notified during the telephone conversation with the court clerk that the case had been transferred for all further proceedings to United States District Judge Jack E. Tanner. On June 17, 1987 a minute entry was filed reflecting the order of transfer.

4. Neither I nor counsel for the government had been advised of the prospect of a transfer before the telephonic notice was made.

/s/ Michael G. Martin

SUBSCRIBED AND SWORN to before me this 26th day of September, 1988.

/s/ Virginia A. Dailey
NOTARY PUBLIC in and for the state of
Washington, residing at Seattle
My appointment expires 7-8-89.

AFFIDAVIT OF
JOSEPH SCHLESINGER

STATE OF WASHINGTON )
: ss
COUNTY OF KING )

I, Joseph Schlesinger, being first duly sworn and upon my oath, depose and say:

1. I am an Assistant Federal Public Defender and am appointed to represent the defendant, Thomas Charles Syrotchen, in Cause number CR88-95R.

2. To the best of my recollection, sometime prior to the entry of Mr. Syrotchen's plea, I was notified by Judge Rothstein's in-court clerk, Elizabeth Tyree, that the case would be transferred to Judge Tanner if Mr. Syrotchen did not intent to plead guilty.

3. Mr. Syrotchen subsequently pleaded guilty, but was allowed to withdraw his plea. The case was then immediately transferred to Judge Tanner.

4. Shortly thereafter, Assistant United States Attorney Stephen Schroeder informed me that in his opinion, based on prior experience, the case would be retained by Chief Judge Rothstein if Mr. Syrotchen immediately sought to re-enter a plea of guilty.

5. I am also appointed to represent the defendant Orlando Pierce in Cause number CR88-108R. That case originally was assigned to Chief Judge Rothstein, but was transferred to Judge Tanner for trial.

6. I am also appointed to represent the defendant Steven Ward in Cause number CR88-50TB.

7. That case was originally assigned to Judge Bryan.

8. During a telephone conversation call conducted by the Judge a motions hearing date and trial date was established at a time mutually convenient to all parties.

9. Shortly before trial was to begin the case was reassigned to Judge Tanner, without warning.

10. As a result, Mr. Ward and his co-defendant, Michael William Bowen both decided to enter pleas of guilty.

/s/ Joseph Schlesinger

SUBSCRIBED AND SWORN to before me this 26th day of September, 1988.

/s/ Virginia A. Dailey
NOTARY PUBLIC in and for the state of
Washington, residing at Seattle.
My appointment expires 7-8-89.

---

AFFIDAVIT OF
THOMAS W. HILLIER, II

STATE OF WASHINGTON )
: ss
COUNTY OF KING )

I, Thomas W. Hillier, II, being first duly sworn and upon my oath, depose and say:

1. I am the Federal Public Defender for the Western District of Washington. I am familiar with a motion filed by Joseph Schlesinger, an attorney in my office, seeking reconsideration of a case transfer order in the matter of *United States v. Thomas Charles Syrotchen*.

2. The motion addresses concerns with the transfer of criminal cases from this Court to Judge Tanner when it appears that the defendant intends to exercise his or her Constitutional right to go to trial. It has come to my attention through discussions with counsel not associated with his office that the concerns expressed in this motion are not isolated.

3. On September 20, I talked with two local criminal practitioners. Both informed me that they had cases pending before this Court. Both were advised by the United States Attorney's Office that the case was in jeopardy of being transferred to Judge Tanner if the case was not resolved with a guilty plea. Apparently, a clerk for this Court advised both Assistant United States Attorneys that a transfer to Judge Tanner was likely unless there was a guilty plea. The possibility of a transfer to Judge Tanner is not insignificant. It is universally recognized in this district that Judge Tanner sentences more severely than any other judge in the district. Moreover, he is generally hostile to defense motions or defense objections. Thus, the "threat" of a transfer to Judge Tanner is a circumstance which cannot be ignored by competent and effective criminal attorneys.

4. One effect of threatened and/or actual case transfers to Judge Tanner is the involvement, perhaps unwittingly, of the Court in the plea bargaining process.

As indicated above, the United States Attorney uses the possibility of a transfer to encourage plea discussions. This would seem prohibited by Rule 11, Fed. R. Crim. P. Beyond that prohibition, it is clear that attorneys in this community have grave concerns about the fairness of the practice and the potential effect of such transfers on the administration of justice in the-Western District of Washington.

/s/ Thomas W. Hillier, II

SUBSCRIBED AND SWORN to before me this 26th day of September, 1988.

/s/ Virginia A. Dailey
NOTARY PUBLIC in and for the State of Washington, residing at Seattle.
My appointment expires 7-8-89.

# OPPOSITION BRIEF

Supreme Court, U.S.
FILED
APR 24 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1383

# In the Supreme Court of the United States

OCTOBER TERM, 1989

RAYMOND M. GRAY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
*Solicitor General*

EDWARD S.G. DENNIS, JR.
*Assistant Attorney General*

JOEL M. GERSHOWITZ
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

BEST AVAILABLE COPY

## QUESTIONS PRESENTED

1. Whether, in this prosecution for failing to appear before the court for sentencing, the attorney-client privilege barred petitioner's former attorney from testifying that he had advised petitioner of his sentencing date and his obligation to appear.

2. Whether petitioner's conviction must be reversed on the ground that the case was reassigned to another judge in violation of the local district court rules.

3. Whether the prosecutor, in rebuttal summation, improperly referred to petitioner's invocation of his Fifth Amendment privilege against compulsory self-incrimination.

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# In the Supreme Court of the United States

OCTOBER TERM, 1989

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No. 89-1383

RAYMOND M. GRAY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-19) is reported at 876 F.2d 1411.

### JURISDICTION

The judgment of the court of appeals was entered on June 5, 1989. A petition for rehearing was denied on December 28, 1989. Pet. App. 20. The petition for a writ of certiorari was filed on February 28, 1990. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

After a jury trial in the United States District Court for the Western District of Washington, petitioner was con-

victed on one count of failing to appear before the court for sentencing, in violation of 18 U.S.C. 3146(a) and (b). He was sentenced to a term of five years' imprisonment, to be served consecutively to the term of 15 years' imprisonment petitioner was then serving for the underlying bank fraud conviction. He was also fined $250,000. The court of appeals affirmed petitioner's conviction, but remanded for resentencing under the Sentencing Guidelines. Pet. App. 1-19.

1. In July 1986, petitioner was indicted in the Western District of Washington on one count of conspiracy to commit a series of bank fraud offenses and several counts of substantive fraud offenses.[1] Those charges arose out of petitioner's activities as Chairman of the Board of Directors of Home Savings and Loan Association, in Seattle. On August 7, 1986, petitioner was arraigned and, after executing an appearance bond, released on his own recognizance. The bond provided that petitioner must appear for trial and all other proceedings in the case. Pet. App. 2-3.

Petitioner's trial began in early March 1987. After the close of the presentation of evidence on May 28, 1987, petitioner executed a "handwritten waiver of appearance statement" prepared by his trial counsel, Kent Robison. Pet. App. 3. That waiver stated: "I, Raymond M. Gray, do hereby waive my presence at subsequent proceedings in this matter, specifically the return of the verdict." *Ibid.* On June 3, the jury found petitioner guilty on all counts. After several delays, the district court scheduled petitioner's sentencing for September 25, 1987. *Ibid.*

Petitioner did not appear for sentencing on September 25. As a result, the district court issued a bench warrant for petitioner's arrest. On December 8, 1987, the Mexican

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[1] The pertinent facts, which petitioner does not dispute here, are summarized in the court of appeals' opinion. See Pet. App. 2-4.

Federal Judicial Police informed the United States Marshal's Service that petitioner was being detained at the Tijuana International Airport, in Tijuana, Mexico. That same day, Deputy United States Marshal Enrique Perez met the Mexican authorities at San Ysidro, California, where he arrested petitioner. Petitioner was sentenced on the outstanding bank fraud conviction and later indicted on one count of failing to appear before the court for sentencing, in violation of 18 U.S.C. 3146(a) and (b). Pet. App. 3.

2. Petitioner's case was initially assigned to Judge John C. Coughenour. On February 4, 1988, Judge Coughenour reassigned the case to Chief Judge Barbara J. Rothstein. Judge Coughenour had not notified the parties in advance and did not explain the reassignment. On March 18, Chief Judge Rothstein reassigned the case, without notice or explanation, to Judge Jack E. Tanner. Pet. App. 3. On March 29, petitioner filed a pretrial motion requesting that Judge Tanner reassign the case back to Judge Coughenour or, in the alternative, that he return the case to the Clerk of the District Court for reassignment according to the local district court rules. After a brief hearing, Judge Tanner denied the motion. *Id.* at 4.

3. At trial, petitioner's former attorney, Kent Robison, testified that during the week preceding September 25, 1987, he told petitioner of the September 25 sentencing date and reminded petitioner that he must attend. Robison also testified that he repeated his instructions to petitioner the day before the scheduled sentencing. Pet. App. 4.

During rebuttal argument, the prosecutor, in explaining to the jury why the government is not required to prove guilt beyond all possible doubt, stated: "[U]nless you were [petitioner], unless you were inside his mind on the night of the 24th, the day of the 25th, unless you were there inside his mind you would never know beyond all possible doubt what was going on in his mind." Pet. App. 11-12. Petitioner

moved for a mistrial, contending that that comment improperly called attention to his decision not to take the stand. The district court denied the motion. *Id.* at 10.

4. The court of appeals affirmed petitioner's conviction. Pet. App. 1-19.[2] In the court of appeals, petitioner contended that his case was reassigned in violation of the local district court rules.[3] Specifically, petitioner argued that each reassignment violated General Rule 8(a), as the Clerk had not directed the transfers. In addition, petitioner claimed that the first reassignment was invalid because only the Chief Judge—and not Judge Coughenour—had the authority to take such action under Paragraph 14 of the General Order. And he claimed that the second reassignment was improper because Chief Judge Rothstein did not state that she was exercising her authority under that provision, which "only authorizes system-wide changes in the assignment process." Pet. 6-7.

The court of appeals found that petitioner had not objected to the first reassignment until after the case had been reassigned for the second time. The court therefore held that petitioner had "waived his challenge to the first reassignment." Pet. App. 6. The court then rejected petitioner's challenge to the second reassignment, concluding that the

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[2] The court of appeals agreed with petitioner that he should have been sentenced under the Sentencing Guidelines and thus remanded the case for resentencing. Pet. App. 14-19.

[3] Petitioner cited General Rule 8(a) of the Local Rules for the Western District of Washington, which provides that "[a]ll actions, causes, and proceedings, civil and criminal, shall be assigned by the Clerk to the respective Judges of the Court." W.D. Wash. R. 8(a). Petitioner also relied on Paragraph 14 of the General Order for the Western District of Washington, which provides in pertinent part that "[t]he assignment of all * * * criminal cases * * * is made subject to such change or changes as may be established by the Chief Judge for purposes of equalization of case assignments to all active Judges of the district." Pet. App. 6.

"scope of paragraph 14 * * * is simply not limited by the restrictive language which [petitioner] has interposed." *Id.* at 7.[4] Moreover, the court determined that the language of Paragraph 14 "does not require the Chief Judge to indicate an intent to act pursuant to the General Order." *Ibid.* Noting that petitioner did "not allege that the reassignment to Judge Tanner was for an impermissible reason," the court held that "the reassignment * * * [was] permissible and within the scope of paragraph 14 of the General Order." *Ibid.*

Petitioner also contended that the attorney-client privilege barred his former attorney from testifying that he had advised petitioner of the sentencing date and his obligation to appear at that proceeding. The court of appeals rejected that claim, holding that "information concerning a defendant's obligation to appear for sentencing is not 'of a confidential nature' and therefore, is not protected by the attorney-client privilege." Pet. App. 8 (quoting *United States* v. *Freeman*, 519 F.2d 67, 68 (9th Cir. 1975)).

The court also declined petitioner's invitation to invoke the "last link" doctrine—"a limited and narrow exception * * * that obtains when disclosure of the [allegedly privileged information] would supply the last link in an existing chain of incriminating evidence likely to lead to the client's indictment." Pet. App. 8 (quoting *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026, 1027 (5th Cir. 1982) (en banc)). The court noted that that "narrow exception" applies only in "exceptional circumstances in which disclosure 'would reveal information that is tantamount to a confidential professional communication.' " Pet. App. 9 (quoting *Tornay* v. *United States*, 840 F.2d 1424, 1428 (9th Cir.

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[4] The court of appeals rejected petitioner's contention that the second reassignment violated General Rule 8(a), determining that such action was authorized by Paragraph 14 of the General Order. Pet. App. 5-7.

1988)). The court therefore agreed with the Eleventh Circuit's recent decision in *United States* v. *Innella*, 821 F.2d 1566, 1567 (1987), which held that the last link doctrine does not protect information concerning an obligation to appear since the attorney "was acting as an officer of the court when he notified his client of the proper date the client was supposed to turn himself in." Pet. App. 10.

Lastly, the court of appeals rejected petitioner's contention that the prosecutor, in his rebuttal argument, improperly referred to petitioner's invocation of his Fifth Amendment privilege against compulsory self-incrimination. The court found that "[i]n context, it is apparent that the prosecution sought to highlight for the jury the fact that the government was not required to prove guilt beyond all possible doubt." Pet. App. 12. The court therefore concluded that the prosecutor "was simply trying to explain the rationale for his burden of proof, rather than calling attention to [petitioner's] decision not to testify." *Ibid.*

## ARGUMENT

1. Petitioner renews his contention (Pet. 9-18) that the attorney-client privilege barred petitioner's former attorney from testifying that he had advised petitioner of his sentencing date and obligation to appear at that proceeding. The attorney-client privilege protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance * * *." *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). Such communications are privileged in order to "encourage clients to make full disclosure to their attorneys." *Ibid.* An attorney's communication to a client regarding the date of a required court appearance, however, is "not in the nature of a confidential communication." *United States* v. *Hall*, 346 F.2d 875, 882 (2d Cir.), cert. denied, 382 U.S. 910 (1965). The attorney has the "duty to relay [such] instructions to his client in his capacity as an

officer of the court." 346 F.2d at 882. Accordingly, the courts of appeals have unanimously held that the attorney-client privilege does not protect an attorney's communication to a client regarding the date of a required court appearance. *E.g.*, *United States* v. *Innella*, 821 F.2d 1566, 1567 (11th Cir. 1987); *United States* v. *Clemons*, 676 F.2d 124, 125 (5th Cir. 1982); *In re Grand Jury Proceedings, Des Moines, Iowa*, 568 F.2d 555, 557 (8th Cir. 1977), cert. denied, 435 U.S. 999 (1978); *United States* v. *Freeman*, 519 F.2d 67, 68 (9th Cir. 1975); *United States* v. *Bourassa*, 411 F.2d 69, 74 (10th Cir.), cert. denied, 396 U.S. 915 (1969); *United States* v. *Hall*, 346 F.2d at 882.

Mindful of this line of authority, petitioner invokes (Pet. 17-18) the so-called "last link" doctrine, claiming that Robison's communication was privileged because it was the "last link" in an existing chain of incriminating evidence supporting his conviction. In the past, the Fifth and Ninth Circuits have held that an attorney may not disclose information about fees and clients' identities where such information would yield substantially probative links in an existing chain of inculpatory events or transactions. See, *e.g.*, *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d at 1027; *United States* v. *Hodge & Zweig*, 548 F.2d 1347, 1353 (9th Cir. 1977).[5]

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[5] In more recent cases, the Ninth Circuit has retreated from that position, holding that the attorney-client privilege does not prohibit the disclosure of otherwise unprotected information simply because that information may incriminate the attorney's client. See, *e.g.*, *Tornay* v. *United States*, 840 F.2d 1424, 1427-1428 (9th Cir. 1988); *In re Osterhoudt*, 722 F.2d 591, 593 (9th Cir. 1983). That view is consistent with the holdings of other courts of appeals. See, *e.g.*, *In re Shargel*, 742 F.2d 61, 62-64 (2d Cir. 1984); *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d 489, 492-494 (7th Cir. 1984); *In re Grand Jury Empanelled February 14, 1978 (Markowitz)*, 603 F.2d 469, 473 n.4 (3d Cir. 1979).

Whatever its validity, the "last link" exception does not apply here. The exception arose out of cases in which the government sought from an attorney information regarding "such matters as the fact of retention, the identity of the client, and information surrounding fee and bonding arrangements executed by or on behalf of a client." *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666, 669 (5th Cir. 1975). But no court has ever suggested, much less held, that the "last link" doctrine extends to communications made by an attorney to his client in the attorney's capacity as an officer of the court. Indeed, as petitioner concedes (Pet. 18 n.5), the only other court of appeals to address the issue—the Eleventh Circuit in *United States* v. *Innella*, 821 F.2d 1566 (1987)—squarely held that the "last link" doctrine does not apply to a communication regarding the date of a court appearance. *Id.* at 1567. Accordingly, the court of appeals properly concluded that the attorney-client privilege did not bar petitioner's former attorney from testifying that he advised petitioner of the sentencing date and his obligation to appear at that proceeding.[6]

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[6] Petitioner also contends that Robison's testimony improperly disclosed other allegedly privileged matters, including "advice, appearance obligations, strategies, and [petitioner's] understanding of his obligations." Pet. 10. In the court of appeals, however, petitioner challenged only the admission of Robison's testimony regarding the obligation to appear for sentencing. See Pet. C.A. Br. 22-27; Pet. C.A. Reply Br. 7-12. Petitioner's new challenge is therefore not preserved for review in this Court. *E.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, Robison's testimony about matters other than petitioner's obligation to appear for sentencing was harmless. Those statements could have added nothing of significance to Robison's testimony that he explicitly told petitioner of the date of sentencing and of his obligation to appear.

Petitioner appears to draw a distinction between a lawyer's informing a client of an appearance date and the lawyers's informing the client

2. Petitioner also renews his contention (Pet. 18-25) that his conviction must be reversed because the case was reassigned to another judge in violation of local district court rules.[7] Here, the first reassignment of petitioner's case was made to the Chief Judge; the Chief Judge then reassigned the case a second time. In these circumstances, the Chief Judge presumably authorized each reassignment as required by Paragraph 14 of the General Order for the Western District of Washington, which provides that "[t]he assignment of all * * * criminal cases * * * is made subject to such change or changes as may be established by the Chief Judge for purposes of equalization of case assignments to all active Judges of the district." Pet. App. 6. Contrary to petitioner's suggestion, however, the local rules do not require the Chief Judge either to state the reason for a reassignment or to cite the General Order when reassigning cases. Consequently, the reassignments of petitioner's case were consistent with the local rules.

In any event, "[l]ocal rules governing the assignment of cases are designed as internal housekeeping rules to promote the efficient operation of the district courts; they are not meant to confer rights on litigants." *Sinito* v. *United States*, 750 F.2d 512, 515 (6th Cir. 1984); see *United States* v. *Torbert*, 496 F.2d 154, 157 (9th Cir.), cert. denied, 419

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of his obligation to appear on that date, suggesting that the latter communication is privileged even if the former is not. But an attorney acts no less as an officer of the court when he tells his client of the client's obligation to appear than when he tells the client when to appear. As far as we are aware, no court has adopted the proposed distinction. See, *e.g.*, *In re Walsh*, 623 F.2d 489, 495 (7th Cir.) (attorney may be asked if he told client of client's "duty to reappear before the grand jury if called"), cert. denied, 449 U.S. 994 (1980); *United States* v. *Freeman*, 519 F.2d at 68 (attorney may testify that he told client of "the court's order to appear").

[7] Petitioner errs in relying on General Rule 8(a) since that rule, by its terms, does not speak to reassignment of cases. See note 3, *supra*.

U.S. 857 (1974); *United States* v. *Dichiarinte*, 385 F.2d 333, 337 (7th Cir. 1967), cert. denied, 390 U.S. 945 (1968); *Levine* v. *United States*, 182 F.2d 556, 559 (8th Cir. 1950), cert. denied, 340 U.S. 921 (1951). Except when the litigant establishes that the judge to whom the case was transferred was then disqualified by reason of bias, a reassignment is not "the type of judicial action which can potentially prejudice [a defendant's] substantive rights." *United States* v. *Torbert*, 496 F.2d at 157.[8]

Here, petitioner claims that the second reassignment prejudiced him because of "Judge Tanner's sentencing practices and pro-Government attitudes and rulings." Pet. 21. Petitioner even suggests (Pet. 21-22) that the case was reassigned in order to penalize him for choosing to go to trial.[9] Those speculative claims are meritless. First, petitioner has never alleged that Judge Tanner was disqualified from trying his case for any reason. Second, the record contains nothing to suggest—and petitioner did not even try to make a showing in the courts below—that his case was reassigned for impermissible purposes. See *Cruz* v. *Abbate*, 812 F.2d 571, 574 (9th Cir. 1987). Finally, petitioner has no right to be tried by any particular trial judge. See, *e.g.*, *United States* v. *Braasch*, 505 F.2d 139, 147 (7th Cir. 1974), cert. denied,

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[8] Petitioner errs (Pet. 20) in relying on *United States* v. *Ferretti*, 635 F.2d 1089 (3d Cir. 1980). In *Ferretti*, the local rule at issue entitled criminal defendants who presented no evidence to make the last closing argument. The court of appeals ordered a new trial where the trial judge had violated that local rule and the defendant had relied on the rule in deciding not to present any evidence. *Id.* at 1090-1094. Here, by contrast, the rules at issue involve court administration as opposed to trial procedure, and petitioner cannot be said to have relied on the local assignment rules in planning his trial strategy. In any event, as the court of appeals correctly concluded, the reassignments of petitioner's case were consistent with the local rules.

[9] Petitioner does not allege that the first reassignment prejudiced him.

421 U.S. 910 (1975); *United States* v. *Stone*, 411 F.2d 597, 598 (5th Cir. 1969).

3. Lastly, petitioner appears to renew his contention that the prosecutor, in rebuttal summation, improperly referred to petitioner's invocation of his Fifth Amendment privilege against compulsory self-incrimination. Petitioner presents this issue for review, see Pet. i ("Questions Presented for Review"), but chooses not to address it in the petition. In any event, there was absolutely nothing wrong with the prosecutor's comment: "unless you were [petitioner], unless you were inside his mind on the night of the 24th, the day of the 25th, unless you were there inside his mind you would never know beyond all possible doubt what was going on in his mind." Pet. App. 11-12. As the court of appeals determined, that comment amounted to a permissible explanation of "the rationale for [the government's] burden of proof, rather than calling attention to [petitioner's] decision not to testify." *Id.* at 12.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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